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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 42

GUY A. THOMPSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, PETITIONERS,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1945.

CERTIORARI GRANTED APRIL 23, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1000

GUY A. THOMPSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR; AND THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, PETITIONERS,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

INDEX

	Original	Print
Record from District Court of Nueces County	1	1
Caption	(omitted in printing)	1
Defendants' original answer	2	1
Defendants' demand for admission of facts	12	9
Response to demand by defendants for admission of facts	16	12
Demand by plaintiff for admission of facts	19	14
Response of defendants to demand for admission of facts	35	28
Plaintiff's first amended original petition	44	36
Plea of defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Co.	54	48
Motion to stay proceedings as to defendant, The St. Louis, Brownsville & Mexico Railway Company	68	56
Answer to plea of jurisdiction of Guy A. Thompson, trustee for the defendant, St. Louis, Brownsville and Mexico Railway Company	77	63
Answer to motion of defendant, St. Louis, Brownsville and Mexico Railway Company for stay order	81	66

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 1, 1945.

—6881

Record from District Court of Nueces County—Continued	Original	Print
Order overruling motion to dismiss and/or stay proceedings as to defendant St. Louis, Brownsville and Mexico Railway Company	85	69
Order overruling plea to jurisdiction of the defendant, Guy A. Thompson, trustee	86	69
Motion of defendant, St. Louis, Brownsville & Mexico Railroad Company for peremptory instruction	87	70
Motion of defendant, Guy A. Thompson, trustee for peremptory instruction	89	71
Defendant's objections to the charge of the Court	93	74
Charge of the Court and verdict of the Jury	96	76
Jury's request for instructions	99	78
Additional charge	100	79
Motion of defendants for judgment non obstante verdicto	101	79
Judgment overruling motion for judgment non obstante verdicto	107	84
Motion for judgment in behalf of plaintiff	108	84
Judgment	109	85
Motion of defendant, Guy A. Thompson, trustee, for new trial	117	91
Judgment overruling motion of trustee for new trial	122	95
Motion of defendant, The St. Louis, Brownsville & Mexico Railway Company, for new trial	123	96
Judgment overruling motion for new trial	129	100
Appeal bond (omitted in printing)	130	
Request for transcript	135	101
Clerk's bill of costs (omitted in printing)	137	
Clerk's certificate (omitted in printing)	139	
Reporter's transcript of hearing	145	103
Caption and appearances	145	103
Motion to disqualify judge	146	103
Defendants' Exhibits Nos. 1 to 8—Bankruptcy Court orders	147	103
Plaintiff's Exhibit No. 9—Plaintiff's original petition	181	127
Plaintiff's Exhibit No. 10—Defendants' original answer (copy) (omitted in printing)	217	
Palintiff's Exhibits Nos. 11 to 22—Demands and admissions	234	151
Plaintiff's Exhibit No. 24 (for identification)—Letter, Miller to Dodd, August 29, 1904	245	161
Plaintiff's Exhibit No. 24-A—Plaintiff's amended petition (copy) (omitted in printing)	248	
Plaintiff's Exhibit—Docket entries	266	163
Testimony of R. R. Fenner	268	163
Defendant's Exhibit No. 26—Letter, Neff to Fenner, August 4, 1943	277	169
Defendants' Exhibit—Plaintiff's demand 15 and admission	284	174
Defendant's Exhibit No. 27—Application to the Interstate Commerce Commission	286	175

	Original	Print
Record from District Court of Nueces County—Continued		
Reporter's transcript of hearing—Continued		
Defendants' Exhibit No. 28—Letter of Secretary of Interstate Commerce Commission	301	185
Testimony on motion to stay and plea of jurisdiction closed	302	185
Order overruling motion to stay and plea of jurisdiction	303	186
Proceedings in Court of Civil Appeals of Texas, Fourth Supreme Judicial District	1129	186
Statement of points to be relied upon	1129	186
Opinion, Norvell, J.	1132	189
Judgment	1143	199
Motion for rehearing	1144	199
Order overruling motion for rehearing	1150	204
Proceedings in Supreme Court of Texas	1151	204
Application for writ of error	1151	204
Judgment refusing application for writ of error	1162	212
Order overruling motion for rehearing	1162	212
Motion for rehearing	1163	213
Additional proceedings in Court of Civil Appeals of Texas	1170	217
Motion for stay of issuance of mandate	1170	217
Order staying mandate	1172	218
Praecipe for transcript of record	1173	218
Clerk's certificate (omitted in printing)	1175	
Stipulation as to printed record	1177	219
Order allowing certiorari	1179	221

[Vol. 1] [Caption omitted]

[Vol. 2]

IN THE DISTRICT COURT, 94TH JUDICIAL DISTRICT, NUECES COUNTY, TEXAS

No. 24588-C

THE TEXAS MEXICAN RAILWAY COMPANY

vs.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, et al.

ORIGINAL ANSWER OF DEFENDANTS—Filed June 20, 1942

Now come defendants, The St. Louis, Brownsville & Mexico Railway Company, and Guy A. Thompson, Trustees of The St. Louis, Brownsville & Mexico Railway Company, and for answer to the original petition of plaintiff filed herein on the 25th day of May, 1942, say:

1

Except as hereinafter expressly admitted, these defendants deny all and singular the allegations in said petition contained and demand strict proof of same on trial hereof; and of this they put themselves upon the country.

2

Specially answering said petition, if so required, defendants admit that on and prior to November 1, 1904, and continuously from said date to this time, plaintiff was and is engaged in the operation of a line of railway from Laredo, Texas, to Corpus Christi, Texas, passing through the town of Robstown in Nueces County, in said State; that defendant, The St. Louis, Brownsville & Mexico Railway Company, on said November 1, 1904, and continuously after said date until the 1st day of July, 1933, operated its trains over the tracks of plaintiff between and in Robstown and Corpus Christi, under the terms of a written contract entered into by and between it and the plaintiff; that from said last named date said railway line was operated by L. W. Boldwin and Guy A. Thompson as Trustees until

the 25th day of December, 1935; that on or about the 26th day of December, 1935, defendant, Guy A. Thompson, as sole Trustee, took over the operation of the railroad and trains of The St. Louis, Brownsville & Mexico Railway Company and has since said date continuously operated [fol. 3] the same; that the said defendant, Guy A. Thompson, as Trustee, is and since December 26, 1935, has been operating trains of the defendant, The St. Louis, Brownsville & Mexico Railway Company, under and by virtue of certain orders made and entered by the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, in a matter then and now pending before said Court entitled "In the matter of Missouri Pacific Railroad Company, Debtor," said matter numbered being No. 6935 on the bankruptcy docket of said Court.

3

Defendants admit that on or about the 1st day of November, 1904, The St. Louis, Brownsville & Mexico Railway Company made a contract with the plaintiff as described in Paragraph II of the petition, and as set forth in hæc verba as an exhibit to said petition, mentioned as "Exhibit 1".

4

Defendants admit that on or about October 1, 1914, a supplemental written agreement was made by and between plaintiff, as party of the first part, and Frank Andrews, Receiver of The St. Louis, Brownsville & Mexico Railway Company, as party of the second part, and The St. Louis, Brownsville & Mexico Railway Company, as party of the third part, in words and figures substantially as set forth in an exhibit attached to the original petition of plaintiff, mentioned as "Exhibit 2".

And defendants admit the truth of the allegations set forth in Sections (a), (b), (c), (d) and (e) of said Paragraph III of plaintiff's petition, but refer to the contracts for an exact statement of their provisions.

[fol. 4] These defendants deny the allegations of Section (f) of said Paragraph III of Plaintiff's petition to the effect that "that said contract was made with the understanding of both parties thereto, and it was then so contemplated by the parties thereto, that The St. Louis, Brownsville & Mexico Railway Company would make exclusive use

of said tracks and property of plaintiff for the movement and handling of all cars into and out of Corpus Christi, routed via said Brownsville Railroad Company and its successors," and aver that no understanding or agreement was reached or made by the parties to the two agreements above mentioned, excepting those which are expressed in the contracts.

Defendants further deny that they have abandoned the operations under said contract which produced a compensating consideration to the plaintiff at the time of the execution of the first contract; and aver that they have throughout the life of the contract complied with and still are complying with the obligations imposed upon defendants by either or both of said contracts and that defendant Trustee is now operating one train per day in each direction, as expressly required by the terms of the contract first made.

Answering Section (g) of Paragraph III of plaintiff's original petition, defendants admit that the motive power and equipment operated by them over the tracks of plaintiff between Robstown and Corpus Christi and in the yards at said two points, are heavier but deny that same are operated at substantially greater speed than when said first contract was made. In this connection defendants aver that plaintiff has, since the 1st day of November, 1904, improved its roadbed and tracks by the deposit of ballast and the installation of more and better ties and stronger and heavier rails, in order to carry safely and expeditiously its own trains and locomotives, and that no appreciable damage is done to plaintiff by the operation of the engines and rolling stock of defendants over said line, and that the increase in the weight of the power, and the increase, if any, in the equipment operated by defendants over the plaintiff's [fol. 3] tracks and properties represent no more than a fair reflection of the trend toward heavier power and heavier car-loading which the railroads of the country, in general, have created for the betterment of their service to the public.

Defendants deny the allegations of Section (h) of Paragraph III of plaintiff's petition to the effect that the contracts authorizing defendants to use the main line and terminal facilities of defendant at Robstown and Corpus Christi and between said points was or is limited by the terms of said contracts or either of them to cars moving

into or out of Corpus Christi by defendants as delivering or originating carrier. On the contrary, defendants aver that said contracts give them full right to use jointly with plaintiff all or any part of the line between Robstown and Corpus Christi and all or any part of the switch tracks and terminals at each of said places in any manner defendants shall find proper and in the performance of any duty devolving upon defendants as a common carrier of freight and passenger for hire.

5

Defendants have not sufficient information to enable them either to admit or deny the allegations of Section (a) in Paragraph IV of plaintiff's original petition, respecting contracts between plaintiff and its employees. But these defendants aver that any contracts made by plaintiff with its employees were made long since the execution of the two contracts attached to plaintiff's original petition, and were made with full knowledge on the part of plaintiff and such employees of the rights of defendants under and by virtue of the contracts pleaded by plaintiff; and plaintiff has no lawful right to attempt to repudiate its contracts with these defendants because of other contracts it has since made with other parties.

Answering Section (b) of Paragraph IV of said petition, these defendants admit that on or shortly after October 28th, 1940, they received from plaintiff a letter bearing said date, requesting defendants to consider said letter as formal notice on the part of the Texas Mexican Railway Company [fol. 6] of its intention to terminate and cancel, effective twelve (12) months after November 1, 1940, that certain contract executed between The Texas Mexican Railway Company and The St. Louis, Brownsville & Mexico Railway Company, dated the 1st day of November, 1904, and also all other supplementary contracts and memorandums of agreement thereto, with respect to the use by defendants of the rails and tracks of The Texas Mexican Railway Company in its yards at Corpus Christi, Texas, and between Corpus Christi and Robstown, Texas.

6

Answering Section (a) of Paragraph V of said petition, these defendants deny that they have used tracks in the yards of plaintiff whimsically or in defiance of the rights

of plaintiff; but aver that they have made use of said yards and tracks in strict accordance with valid and subsisting contracts heretofore made with plaintiff (being the contracts, copies of which are attached as exhibits to plaintiff's petition), which contracts are still in full force and effect.

Answering Section (b) of Paragraph V of plaintiff's petition, defendants aver that, prior to the execution of any contracts between plaintiff and defendants, to-wit, during the year 1887, the Congress of the United States duly enacted and the President approved a law commonly known as the Interstate Commerce Act of 1887, and that the same, with various amendments not necessary to be here described, continued in effect until and since the 28th day of February, 1920; that on said latter date the Congress of the United States duly enacted and the President approved a law, commonly called and known as the Transportation Act, 1920, amendatory of and supplementary to said original Interstate Commerce Act, and said Transportation Act was incorporated into and became a part of said Interstate Commerce Act, is now generally known by that name and since February 28th, 1920, down to and including the present time, the same has been in full effect. That among other provisions of said law are Paragraphs [fol. 7] (18) (19) and (20) of Section 1 of said Interstate Commerce Act; that by said paragraphs it was made unlawful and is now unlawful for any common carrier by railroad, such as these defendants are, subject to said Interstate Commerce Act to undertake the extension of its line of railroad or the construction of a new line of railroad or the acquisition and operation of any line of railroad or extension thereof unless and until there should have first been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or would require the construction, or operation, or construction and operation of such additional or extended line; and it was by said Act further provided that no such carrier by railroad subject to said Act should abandon all or any portion of its line of railroad, or the operation thereof, unless and until there should be first obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity permit of such abandonment; that provision was in said section made for the filing of applications for such certificates, notice to the proper

parties, and hearing before the Interstate Commerce Commission; and it was further provided that any construction, operation or abandonment contrary to such law might be enjoined by any court of competent jurisdiction at the suit of the United States, the Interstate Commerce Commission, any commission or regulating body of the State or States affected, or any party in interest; and further that any such carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of said provisions of such law, should, upon conviction thereof, be punished by a fine of not more than $5,000.00 or by imprisonment for not more than three (3) years, or both.

[fol. 8] In this connection defendants allege that the plaintiff is, and at all times since the 1st day of November, 1904, has been a common carrier of freight and passengers for hire, engaged in the business of transporting freight and passengers both in Texas intrastate commerce and in interstate and foreign commerce; that the defendant, The St. Louis, Brownsville & Mexico Railway Company, and (since his appointment) defendant, Guy A. Thompson, Trustee of the said The St. Louis, Brownsville & Mexico Railway Company, have been and are engaged as common carriers of freight and passengers for hire, engaged in transporting freight and passengers in such intrastate, interstate and foreign commerces and that all parties, plaintiff and defendants, are and have been since the passage of the Act above described and now are subject to said law; and that since the passage of the Act of Congress above described neither plaintiff nor defendants could lawfully cease or abandon the operation of trains of The St. Louis, Brownsville & Mexico Railway Company between Robstown and Corpus Christi, or any of the other services contemplated by said contracts, unless and until the Interstate Commerce Commission shall have issued a certificate that the public convenience and necessity no longer require the said operations by defendants but permit of their abandonment. In this connection these defendants aver that no such certificate has been obtained from or issued by said Commission to the effect that the present and future public convenience and necessity permit of the abandonment of the operations by defendants under the terms of said contracts. Wherefore, these defendants say that any

and all notices of cancellation and any other act or word by plaintiff seeking to bring about a cessation of operations under said contracts were and are utterly void and without any legal effect; and that said contracts are, therefore, in full force.

Answering Section (c) of Paragraph V of said petition, these defendants say that the effort of plaintiff to establish a charge against defendants of $500.00 per day for the use of plaintiff's property as described in said contracts was [fol. 9] never assented to by these defendants and, therefore, did not effect a novation of said contracts or the creation of a new contract in respect to compensation to be paid by defendants, and is, therefore, void and of no legal effect. In this connection defendant, Guy A. Thompson, Trustee, avers that he has at all times stood willing and now stands willing and is ready and able to pay to the plaintiff the compensation stipulated in the contracts above described, and that on May 21st, 1942, acting by and through L. M. Edrington as the Auditor of such Trustee, the said Trustee addressed and forwarded by United States Mail to G. B. Winch, the Auditor of plaintiff at Laredo, Texas, a letter requesting that plaintiff prepare and send to said defendant Trustee proper bills or statements of account for the period beginning November 1st, 1941, and continuing on from that date, in order that said defendant Trustee might make payment of all bills theretofore approved and periodical payment of bills which might thereafter accrue. The plaintiff is notified to produce the original of said letter upon the trial of this cause, or secondary evidence will be introduced to prove its contents. In this connection said defendant, Guy A. Thompson, Trustee, declares himself ready, able and willing to pay promptly such bills and avers that some of the facts from which such bills must be prepared are disclosed solely by records of plaintiff Company and that without the presentation to him by plaintiff of proper bills and statements of the pertinent facts, said defendant is not able to compute or make payment of the amounts due.

Answering Section (d) of Paragraph V of plaintiff's petition, these defendants deny that they have taken any property of plaintiff in violation of any law or of any provision of the Constitution of the United States or the Constitution of Texas.

7

Answering Section (a) of Paragraph VI of plaintiff's original petition, defendants deny that their employees or any of them have demanded that these defendants discontinue use of plaintiff's property under the contracts above [fol. 10] described.

Answering Section (b) of Paragraph VI of said petition, these defendants admit that plaintiff at one time proposed to withdraw its notice of cancellation of the contract between plaintiff and defendants if defendants would agree to indemnify plaintiff against any loss it might sustain as a result of an award against it by the National Railroad Labor Adjustment Board. And in this connection the defendants aver that neither of them is under any legal or moral duty to indemnify plaintiff against the effects of any contracts, improvident or otherwise, it might have made with other persons, subsequent to the execution of the contracts which plaintiff made with these defendants.

8

Answering all of Paragraph VII of said petition, these defendants deny each and every claim asserted therein.

9

Answering the first section of Paragraph VIII of said petition, defendants deny that plaintiff could lawfully have locked its switches and met the employees of defendants with force for the purpose of excluding employees of defendants from the tracks of plaintiff covered by said two contracts, for the reason that, unless and until an application is filed with and presented to the Interstate Commerce Commission for a certificate that the present and future public convenience and necessity permit of an abandonment by these defendants of the operation of trains and cars as stipulated in said contracts, and said Interstate Commerce Commission shall have issued such a certificate, these defendants could not and cannot lawfully abandon such operations and neither the plaintiff nor its officers, agents, attorneys, servants or employees could lawfully interfere with the operation by defendants or either of them of trains, engines and cars over the territory and properties described in said contracts.

Having fully answered, these defendants say that plain-
[fol. 11] tiff is not entitled either at law or in equity to the injunctive relief sought nor the sums of money demanded nor any of the relief prayed for in its petition. And these defendants pray judgment that plaintiff take nothing by its action against them, and that they and each of them go hence without day and recover of and from plaintiff their costs.

Andrews, Kelley, Kurth & Campbell, of Houston, Texas; E. H. Crenshaw, Jr., of Kingsville, Texas; John C. North of Corpus Christi, Texas, By E. H. Crenshaw, Jr., Attorneys for Defendants.

[File endorsement omitted.]

Duly sworn to by E. H. Crenshaw, Jr. Jurat omitted in printing.

[fol. 12] In District Court of Nueces County

[Title omitted]

Demand for Admission of Facts—Filed June 20, 1942

To the Plaintiff, The Texas Mexican Railway Company, or to Honorable J. D. Dodson, E. R. Kleberg and Marcellus G. Eckhardt, Jr., its Attorneys of Record:

Pursuant to Rule No. 169 of the Texas Rules of Civil Procedure, the defendants in the above entitled cause make demand upon plaintiff for the admission of the following facts, such admission (or denial) to be delivered to defendants or their attorneys or filed with the Clerk of the District Court of Nueces County, Texas, within fifteen (15) days from the delivery of a copy hereof to plaintiff or its Attorneys:

1. That continuously since the 28th day of February, 1920, and at the present time, the plaintiff, The Texas Mexican Railway Company, was and is a common carrier of freight and passengers and was and is engaged in the transportation of freight and passengers in both intrastate commerce and interstate commerce.

2. That continuously from the 28th day of February, 1920, to the 1st day of July, 1933, the defendant, The St.

Louis, Brownsville & Mexico Railway Company, was engaged in the business of a common carrier of freight and passengers for hire and was engaged in the transportation of freight and passengers in both intrastate and interstate commerce over its lines and over that portion of plaintiff's line between Robstown, Texas, and Corpus Christi, Texas.

3. That continuously from the 1st day of July, 1933, until noon of December 26th, 1935, L. A. Baldwin and Guy A. Thompson, as Trustees of The St. Louis, Brownsville & Mexico Railway Company, were engaged in the business of a common carrier of freight and passengers and were en-
[fol. 13] gaged in the transportation of freight and passengers both in intrastate commerce in Texas and in interstate and foreign commerce, over the lines of The St. Louis, Brownsville & Mexico Railway Company, and also over that portion of plaintiff's line of railroad between Robstown, Texas, and Corpus Christi, Texas, and in said towns.

4. That continuously since noon of the 26th day of December, 1935, and at the present time, the defendant, Guy A. Thompson, as sole Trustee of The St. Louis, Brownsville & Mexico Railway Company, was and is engaged in the business of a common carrier of freight and passengers and was and is engaged in the transportation of freight and passengers both in intrastate commerce and in interstate and foreign commerce, over the lines of said The St. Louis, Brownsville & Mexico Railway Company, and also over that portion of plaintiff's line of railway between Robstown, Texas, and Corpus Christi, Texas, and in said towns.

5. That no application has been filed with the Interstate Commerce Commission of the United States of America, praying that said Interstate Commerce Commission issue a certificate that the present or future public convenience and necessity permitted of the abandonment by defendant, Guy A. Thompson as Trustee of The St. Louis, Brownsville & Mexico Railway Company, of operations carried on by him over the switch tracks and terminal facilities of plaintiff at Robstown and at Corpus Christi and the railway lines of plaintiff between said two points.

6. That the Interstate Commerce Commission of the United States of America has not up to the present time, (so far as you know or believe) issued a certificate that the present or future public convenience and necessity permit

of the abandonment by Guy A. Thompson, Trustee of The St. Louis, Brownsville & Mexico Railway Company, of the operations carried on by him over the switch tracks and terminal facilities of plaintiff at Robstown, Texas, and at Corpus Christi, Texas, and the railway lines of plaintiff [fol. 14] between said points.

7. That the attached copy of a letter addressed by L. M. Edrington, Auditor of defendants, to G. B. Winch, Auditor of plaintiff, of date the 21st day of May, 1942, is a true and correct copy of an original letter received through the United States Mails by the said G. B. Winch from the said L. M. Edrington.

Andrews, Kelley, Kurth & Campbell of Houston, Texas; E. H. Crenshaw, Jr., of Kingsville, Texas; John C. North, of Corpus Christi, Texas, Signed by E. H. Crenshaw, Jr., Attorneys for Defendants.

(Copy)

May 21, 1942.

Personal 51-0.

Mr. G. B. Winch, Auditor, The Texas Mexican Ry. Co., Laredo, Texas.

DEAR MR. WINCH:

This will acknowledge the receipt of your letter of the 12th inst. regarding bills for our proportion of joint track expenses.

A controversy exists between our respective managements whether the trackage contract was actually terminated as of November 1, 1941. It is quite evident that we cannot expect to use the property of your company without some compensation for that use, and that is no reason why a big claim should be permitted to accrue during the time that the controversy is unsettled. Therefore, if you will prepare and send us bills for the period on and after November 1941, made up on the basis in effect ~~immediately~~ heretofore, [fol. 15] we will continue to pay them after check and audit, as we did prior to that date, and it will be understood that the rendition, audit and payment of such bills shall be with-

out prejudice to the rights or claims of either of us in connection with the pending controversy.

Yours very truly, (Signed) L. M. Edrington, Auditor.

bcc Mr. H. R. Safford.

[File endorsement omitted.]

[fol. 16] In District Court of Nueces County

[Title omitted]

Response to Demand by Defendants for Admission of Facts—Filed July 2, 1942

Now comes The Texas Mexican Railway Company, Plaintiff in the above styled and numbered cause, and in response to demand for admission of facts filed by Defendants in said cause, served upon Plaintiff June 20, 1942, it says:

1. Plaintiff admits the facts submitted in Paragraph 1 of said demand, but by said admission does not admit that Plaintiff was not engaged as such common carrier prior to Feb. 28, 1920, for the reason that it was such common carrier on and prior to November 1, 1904, and continuously from said date to February 28, 1920.

2. Plaintiff admits the facts submitted in Paragraph 2 of said demand, but does not thereby admit that the St. Louis, Brownsville & Mexico Railway Company was not engaged as such common carrier prior to February 28, 1920, for the reason said Defendant was engaged as such carrier on November 1, 1904, and continuously therefrom to February 28, 1920.

3. Plaintiff does not admit the dates set forth in Paragraph 3 of said demand for the reason it does not have accurate knowledge with respect thereto, and it does not admit that either L. A. Baldwin or Guy A. Thompson or both of them were at any time engaged in the business of a common carrier in intrastate or in interstate and foreign commerce except as Trustees in control of the operations of the St. Louis, Brownsville & Mexico Railway Company with respect to its lines and over that portion of Plaintiff's line of railroad between Robstown, Texas, and Corpus

Christi, Texas, and in said towns, which Plaintiff believes to be true, and upon such belief admits the same to be true.

4. Plaintiff makes no admission with respect to the dates set forth in Paragraph 4 of said demand for the reason it has [fol. 17] no knowledge with respect thereto, and it does not admit that the Defendant Guy A. Thompson was and is engaged in the business of a common carrier in intrastate and interstate and foreign commerce over the lines of the St. Louis, Brownsville & Mexico Railway Company and over that portion of Plaintiff's line of railway between Robstown, Texas, and Corpus Christi, Texas, and in said towns, except as a Trustee in control of the operations of said the St. Louis, Brownsville & Mexico Railway Company, and as to such operations Plaintiff is informed and believes that the Defendant Guy A. Thompson is the duly appointed, qualified and acting Trustee in charge of said operations for said the St. Louis, Brownsville & Mexico Railway Company, and upon such belief admits such fact to be true.

5. Plaintiff is informed and believes that no application has been filed with the Interstate Commerce Commission of the United States of America praying that said Commission issue a certificate that the present or future convenience and necessity permit abandonment by Defendant Guy A. Thompson, as Trustee of the St. Louis, Brownsville & Mexico Railway Company of operations carried on by him over the switch tracks and terminal facilities of Plaintiff at Robstown and at Corpus Christi, and over the railway lines of Plaintiff between said two towns, and upon belief Plaintiff admits the facts set forth in Paragraph 5 of said demand.

6. Plaintiff is informed and believes that the Interstate Commerce Commission of the United States of America has not up to the present time issued a certificate that the present or future public convenience and necessity permit of the abandonment by Guy A. Thompson, Trustee of the St. Louis, Brownsville & Mexico Railway Company, of the operations carried on by him over switch tracks and terminal facilities of Plaintiff at Robstown, Texas, and at Corpus Christi, Texas, and over the railway lines of Plaintiff between said towns, and upon such information and belief admits the facts submitted in Paragraph 6 of said demand to be true.

[fol. 18] 7. Plaintiff admits that the copy of a letter attached to said demand and referred to in Paragraph 7 thereof is a true and correct copy of an original letter received by G. B. Winch, signed L. M. Edrington.

The Texas Mexican Railway Company, by J. D. Dodson & Kleberg & Eckhardt, Its Attorney of Record, Plaintiff.

Duly sworn to by J. D. Dodson. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 19] In District Court of Nueces County

[Title omitted]

Demand by Plaintiff for Admission of Facts—Filed July 8, 1942

To each the defendant, The St. Louis, Brownsville & Mexico Railway Company, and the Defendant, Guy A. Thompson, Trustee, or, to Andrews, Kelley, Kurth & Campbell, E. H. Crenshaw, Jr., and John C. North, Attorneys of Record for each said Defendant.

Pursuant to Rule No. 169 of The Texas Rules of Civil Procedure, Plaintiff in the above styled and numbered cause demands upon each of said Defendants admission of the following facts, such admission (or denial) to be delivered to Plaintiff or to its Attorneys of Record, or filed with the Clerk of the District Court of Nueces County, Texas, within 15 days after delivery of a copy hereof to said defendants or to their said Attorneys:

1. That prior to and on November 1, 1904, and continuously therefrom Plaintiff, The Texas Mexican Railway Company, and Defendant, The St. Louis, Brownsville & Mexico Railway Company, each was as has been a corporation organized under the laws of Texas and engaged as a common carrier in interstate commerce.

2. That all operations of the Defendant, Guy A. Thompson, Trustee, over the railroad tracks, switches and spurs of Plaintiff have been as Trustee for the Defendant The St. Louis, Brownsville & Mexico Railway Company.

3. The Defendant The St. Louis Brownsville & Mexico Railway Company did not either on November 1, 1904, or at any time since said date own or control any railroad track of its own entering the City of Corpus Christi, Texas.

[fol. 20] 4. That H. R. Safford is the chief executive operating agent in Texas for (a) Missouri Pacific Railroad Company; (b) St. Louis Brownsville & Mexico Railway Company; (c) San Antonio, Uvalde & Gulf Railroad Company; (d) Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company; (e) Guy A. Thompson, Trustee for The San Antonio, Uvalde & Gulf Railroad Company.

5. The Defendant Guy A. Thompson, as Trustee for each The St. Louis, Brownsville & Mexico Railway Company and for the San Antonio, Uvalde & Gulf Railroad Company, was appointed and is acting by virtue of reorganization proceedings under Section 77(b) of the Bankruptcy Act initiated by the Missouri Pacific Railroad Company in the United States District Court of St. Louis, Missouri.

6. That there was not at any time from November 1, 1904 to January 1, 1919 any community of interest or control between the Defendant The St. Louis, Brownsville & Mexico Railway Company and The San Antonio, Uvalde & Gulf Railroad Company.

7. That the San Antonio, Uvalde & Gulf Railroad Company is a railroad corporation organized under the laws of Texas and as such operates and has been operating for more than 20 years a line of railway into the City of Corpus Christi, Texas, crossing the line of The St. Louis, Brownsville & Mexico Railway Company at Odem, Texas.

8. That at or about the same time the Trustees were appointed under Section 77(b) of the Bankruptcy Act for the Defendant The St. Louis, Brownsville & Mexico Railway Company the same Trustees were appointed for the same purpose for The San Antonio, Uvalde & Gulf Railroad Company.

9. That the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, now is and continuously since his appointment as Trustee for the Defendant St. Louis, Brownsville & Mexico Railway

Company has been Trustee for The San Antonio, Uvalde & Gulf Railroad Company.

10. That during the entire time Defendant Guy A. Thomp- [fol. 21] son, Trustee, has been operating as such for the Defendant The St. Louis, Brownsville & Gulf Railroad Company a substantial portion of the freight traffic into and out of Corpus Christi via Defendant The St. Louis, Brownsville & Mexico Railway Company has moved over the rails of The San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi.

11. That no Certificate of Public Convenience and Necessity has ever been issued by the Interstate Commerce Commission finding it to be necessary or to the public interest that freight traffic into and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway Company should move over the rails of The San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi.

12. That on all freight traffic into and out of Corpus Christi via the Defendant, The St. Louis, Brownsville & Mexico Railway Company moving over the rails of The San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi, the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, shares with Guy A. Thompson, Trustee for The San Antonio, Uvalde & Gulf Railroad Company, a division in freight revenue on such traffic.

13. That neither the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, nor the Defendant The St. Louis, Brownsville & Mexico Railway Company pays to Plaintiff any compensation on freight traffic moving into and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway Company over the rails of The San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi.

14. That the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, thru his operating agents, has daily since November 1, 1941, directed train operatives to go upon the tracks, switches and terminals of Plaintiff in Corpus Christi and upon the tracks of Plaintiff from Corpus Christi to Robstown under claim of right evidenced by the contract between

[fol. 22] The St. Louis, Brownsville & Mexico Railway Company and The Texas Mexican Railway Company dated November 1, 1904, and the written supplements and amendments thereto.

15. That since November 1, 1941, train operatives of the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, go upon tracks of Plaintiff with locomotives and trains at will without regard for the orders of Plaintiff and its agents.

16. That Exhibit #1 is a true copy of an application which Plaintiff prepared and tendered to the Interstate Commerce Commission for filing.

17. That copies of said Application referred to in Paragraph 16 next preceding were furnished attorneys for Defendant The St. Louis, Brownsville & Mexico Railway Company and Mr. H. R. Safford, Senior Executive Assistant, Union Station, Houston, Texas, and Mr. H. H. Larrimore, Interstate Commerce Counsel, Missouri Pacific Building, St. Louis, Missouri, in August 1941.

18. That Mr. H. H. Larrimore referred to in Paragraph 17 next preceding is the Interstate Commerce Counsel for The Missouri Pacific Railroad Company and for the Defendants.

19. That Exhibit #2 was written by the Secretary of the Interstate Commerce Commission in response to the tender by Plaintiff of the Application (Exhibit #1), and a copy of said letter was sent to Mr. H. R. Safford, St. Louis, Brownsville & Mexico Railway Company, Houston, Texas.

20. That the Interstate Commerce Commission ruled in response to the tender of Plaintiff to file the Application (Exhibit #1) that its jurisdiction extends only to abandonment of operations by The St. Louis, Brownsville & Mexico Railway Company.

21. That Mr. H. R. Safford, Senior Executive Assistant, Missouri Pacific Lines, Houston, Texas, was notified by M. M. Leyendecker, Vice-President and General Manager [fol. 23] for Plaintiff, on November 5, 1941, to the effect that having received no definite statement as to what Mr. Safford proposed to do with respect to the notice of cancella-

tion of the contract of November 1, 1904, and supplements thereto concerning the use of the rails of tracks of Plaintiff in its yard at Corpus Christi and between Corpus Christi and Robstown, and he still operating on the rails of Plaintiff, further continuation thereof would be at a charge of $500.00 a day for the use of said facilities.

22. That by the same letter referred to in Paragraph 21 next preceding request was made on Mr. Safford as Senior Executive Assistant, The Missouri Pacific Lines, to join Plaintiff in an Application to the Interstate Commerce Commission for approval of the cancellation of said contract of November 1, 1904.

23. That The St. Louis, Brownsville & Mexico Railway Company is one of the group of lines controlled by The Missouri Pacific Railroad Company and known as the Missouri Pacific Lines.

24. That Mr. Safford in writing on November 29, 1941, addressed to The Vice-President and General Manager of Plaintiff, acknowledged receipt of the notice November 5, 1941, referred to in Paragraph 21 above, and stated with respect to the $500.00 per day charge for use of facilities: "we are not agreeable to accepting a daily charge of $500.00 per day for use of The Texas Mexican facilities, or any other charge except such as may be in accordance with the contract of November 1, 1904, as supplemented or amended to date."

25. That the Defendants continue and intend to continue the use of the facilities described in said contract of November 1, 1904, as supplemented and amended.

26. That Defendants do not intend to make any application to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity permitting the Defendant or either of them to abandon operations on the lines of Plaintiff by reason of its notice of cancellation of the contract of November 1, 1904, together with supple- [fol. 24] ments and amendments thereto.

27. That if all the freight traffic in and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway Company should move over the rails of Plaintiff between Robstown and Corpus Christi, the revenue to Plaintiff provided by the contract of 1904 and the supplements thereto

would be grossly in excess of the revenue which it was receiving from November 1, 1940 to November 1, 1941.

28. That neither of the Defendants has paid any compensation to Plaintiff for the use of its facilities in Corpus Christi and of its track from Corpus Christi to Robstown since November 1, 1941, with respect to traffic moving into and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway Company except with respect to such of said traffic as the Defendants actually move over the rails of Plaintiff between Corpus Christi and Robstown because Plaintiff refuses to recognize the contract of November 1, 1904, with its supplements and amendments as longer in force, and the Defendants refuse to admit any compensation liability except as determined by the contract of November 1, 1904, with its supplements and amendments as applied to the traffic actually moving into and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway Company over the rails of Plaintiff between Robstown and Corpus Christi.

29. That Defendants would move all freight traffic which they control into and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway Company over the rails of Plaintiff from Robstown to Corpus Christi if there were no community of ownership or control between The St. Louis, Brownsville & Mexico Railway Company operations and the San Antonio, Uvalde & Gulf Railroad Company operations.

Kleberg & Eckhardt, Corpus Christi; E. H. Borchers, Laredo; J. D. Dodson, San Antonio, Attys. for Plaintiff.

[fol. 25] EXHIBIT #1

Copy D. 27 Filed in Evidence by Defendant 8-27-43, Ben A. Ligon, District Clerk, Nueces Co. Tex. By Louise Eubank, Dy.

Before the Interstate Commerce Commission. Finance Docket No. —. In Re: Application of the Texas Mexican Railway Company for authority to Cancel Trackage Agreements with the St. Louis, Brownsville & Mexico Railway Company. Application. J. D. Dodson, General Counsel, 1822 Smith-Young Tower, San Antonio, Texas. M. M.

Leyendecker, Vice-President & Gen. Mgr. Texas Mexican Railway Co., Laredo, Texas.

Before the Interstate Commerce Commission. Finance Docket No. —. In Re: Application of The Texas Mexican Railway Company For Authority To Cancel Trackage Agreements with The St. Louis, Brownsville & Mexico Railway Company. Application.

To The Honorable Interstate Commerce Commission:

The Texas Mexican Railway Company, with leave, hereby tenders for filing its Original Application under Sections 18 to 21, inclusive, Section 1 of the Interstate Commerce Act, for a Certificate of Public Convenience and Necessity to terminate one certain trackage agreement entered into between Applicant and The St. Louis, Brownsville & Mexico Railway Company, November 1, 1904, and one certain supplement thereto entered into October 1, 1914; governing trackage rights of said The St. Louis, Brownsville & Mexico Railway Company on and over tracks of Applicant from Corpus Christi, Texas, to Robstown, Texas, and in support of said Application The Texas Mexican Railway Company, Applicant, respectfully represents to the Commission:

A

The exact corporate name of Applicant is "The Texas Mexican Railway Company".

B

Applicant is a carrier by railroad and is subject to the Interstate Commerce Act. The St. Louis, Brownsville & Mexico Railway Company is a carrier by railroad organized [fol. 26] under the laws of Texas, and owns and operates a line of railway in Texas, which said line of railway is now operated by Guy A. Thompson, Trustee, whose post office address is St. Louis, Missouri.

C

H. R. Safford, whose post office address is Houston, Texas, now is and for more than twelve months next preceding the filing of this Application has been Senior Executive Assistant of The St. Louis, Brownsville & Mexico Railway and of said operation thereof by Guy A. Thompson, Trustee.

D

The proposal through this Application is to permit Applicant to cancel, and to approve the cancellation by Applicant of, one certain contract entered into between Applicant and The St. Louis, Brownsville & Mexico Railway Company (hereinafter called Brownsville Company) November 1, 1904, and one certain supplement thereto between Applicant and said Brownsville Company and Frank Andrews, its Receiver, with respect to trackage rights of said Brownsville Company on the main line track of Applicant between Corpus Christi and Robstown, both in Nueces County, Texas, including rights to use terminals, side tracks, passing tracks and appurtenances for the operation of trains and carrier business.

E

Applicant does not propose to abandon its line of railway or any portion thereof, but seeks solely the termination and cancellation of said contract.

F

The purpose of this Application is to procure from the Commission a Certificate of Public convenience and Necessity authorizing termination by Applicant of one certain Memorandum of Agreement between The Texas Mexican Railway Company and The St. Louis, Brownsville & Mexico Railway Company entered into November 1, 1904, and one certain Supplemental Agreement to said Memorandum of [fol. 27] Agreement between The Texas Mexican Railway Company and The St. Louis, Brownsville & Mexico Railway Company and Frank Andrews, its Receiver, entered into October 1, 1941.

The pertinent facts touching the making of and operations under said agreement and reflecting changed conditions which Applicant deems in its interest to require termination of said memorandum and supplement are substantially as follows:

(1) At the time said memorandum agreement was entered into on October 1, 1904, Applicant owned and operated a line of railway consisting of main line, side tracks, passing tracks, water stations, switches, real estate and its appurtenances incident and necessary to the carrier use of Appli-

cant in operation passenger and freight trains, between the town of Corpus Christi, Texas, and the point at Robstown, Texas, where the main lines of Applicant and of The St. Louis, Brownsville & Mexico Railway Company cross, being a total distance of 16 miles, 2056 feet, thence to Laredo in Webb County, Texas. At the time said agreement was made said Brownsville Company did not own, operate or control any line of railway entering Corpus Christi, Texas, and by said orginal agreement, Applicant, upon conditions and limitations in said agreement stipulated, accorded to said Brownsville Company the right to carry over the above described tracks from Corpus Christi, Texas, to a point where said main line cross at Robstown, Texas, such freight, mail, express and passengers as said Brownsville Company should desire, and to receive for its own use and compensation all revenue arising from such service, and the further right to generally extend and transact its business as a common carrier over the last above described properties of the Applicant; Applicant was obligated by said agreement to maintain said line of railway as above described in a good and safe condition, and the engines and cars of said Brownsville Company, while on said described portion of railway, should be man-[fol. 28] aged and operated by employees of said Brownsville Company, subject to reasonable rules and directions of the operating department of Applicant, and other stipulations with respect to train rights not necessary to here detail but fully stipulated in said original agreement.

(2) In consideration for said grant said Brownsville Company agreed to pay to Applicant a fixed annual rental of $3,277.80 in equal monthly installments of $273.15, which rental represented 2½% of the estimated value of the privileges granted, and in addition thereto agreed to pay a certain proportion of the actual cost of maintenance on the properties used on a "car basis", which is defined in said agreement to be a sum which shall bear the same proportion to the entire cost of maintenance of tracks, buildings, etc., as the number of passenger and freight cars moved over said road between said points by said Brownsville Company shall bear to the total number of cars moved over said line between said points; plus one half of all taxes levied and charged against said property; plus the costs of agents, telegraph operators, clerks and all

other expenses of every character at said Robstown and Corpus Christi and intermediate stations on the said car basis.

(3) Said agreement further provided that the sum of $5,000 which has been donated to said Brownsville Company by the citizens of Corpus Christi for passenger station development at Corpus Christi should be used for that purpose, and that each the Applicant and said Brownsville Company should be equally interested and should equally bear any expense incurred for passenger station development in excess of said $5,000, and a similar provision was made with respect to sharing the expense of constructing a joint combination freight and passenger station at Robstown, where the lines of said Brownsville Company and Applicant cross.

(4) Further stipulations were contained in said agreement, which are not necessary to here review.

(5) By Article 12 of said agreement it took effect November 1, 1904, and was to continue for the full term of [fol. 29] 50 years unless sooner terminated for causes stipulated, and the express provision is contained in the contract that it may be terminated without giving any reason therefor, by either party, upon giving twelve months notice of an intention to terminate.

(6) On October 1, 1944, said supplemental agreement was entered into between Applicant and said Brownsville Company and Frank Andrews, its Receiver, which supplemental agreement stipulated that it should be binding upon termination of the receivership, which has long since terminated.

(7) Said supplemental agreement reaffirmed the original agreement as modified by the supplemental agreement, which modifications were substantially an extension of the rights on the tracks of Applicant from the center of the crossing of the lines of said railways at Robstown to the western yard limits of Applicant at Robstown, being a point 1000 feet west of the west switch stand of Applicant at Robstown, together with all tracks and spurs in said yard limits and the right of Applicant, for the purpose of interchanging cars and of taking water at the Brownsville Company's tank and of turning engines and cars of Applicant at Robs-

town, to use the two wye tracks at Robstown and the main track of said Brownsville Company between the crossing of the two main lines at Robstown and 500 feet south of said wye track switches. Said supplemental agreement further provided that maintenance of that part of the line of Applicant from the center of the crossing of said two main lines at Robstown to a point 2361 feet west thereof should be included in the original agreement for maintenance and that the expense should be prorated in accordance therewith.

(8) Said supplemental agreement further made other provisions with respect to stationery not necessary to here review.

(9) Since the respective executions of said original agreement and supplemental agreement, said original agreement and as modified by said supplement agreement has been recognized as in full force and effect by Applicant [fol. 30] and by said Brownsville Company at all times, by said Frank Andrews, Receiver, so long as said Receivership existed, and by said Trustee, since the operations of said Brownsville Company have been conducted by said Trustee.

(10) At the time said agreement and supplement thereto were executed the provisions for maintenance compensation to Applicant were reasonable by reason of the fact that said Brownsville Company at those times made full use of its rights and privileges, and locomotives were not used over said tracks which were too heavy for their design. Since said dates, however, said Brownsville Company acquired ownership, control and operation of San Antonio, Uvalde & Gulf Railroad Company, (or both have been brought under common control), which crosses the main line of St. Louis, Brownsville & Mexico Railway Company at Odem, Texas, a point at about 20 miles distant from said Corpus Christi, and which gave said Brownsville Company a direct line into Corpus Christi, Texas, and said Brownsville Company and said Trustee have moved the vast majority of their cars and trains, both freight and passenger, into Corpus Christi over its own line and not over the line of Applicant. This change in movement materially decreased the maintenance expense paid by said Brownsville Company, which still uses its said rights and privileges chiefly in full competition with Applicant between Corpus Christi and Robstown on its own line.

(11) The nature of the terrain from Robstown to Corpus Christi is practically level and but a few feet above sea level, making drainage difficult and trackage maintenance proportionately expensive, particularly when subjected to the pounding of heavy locomotives such as are used by the Brownsville Company and said Trustee. The rails and tracks of Applicant are not designed for use by heavy locomotives, but the Brownsville Company and Trustee in recent years have used and now use on said tracks locomotives with dead tonnage greatly in excess of that of any locomotive used by Applicant. The use of such heavy locomotives materially increases track damage and maintenance while the decreased number of cars moved by the Brownsville [fol. 31] Company since it has operated over the S. A. U. & G. line into Corpus Christi has correspondingly decreased the proportion of maintenance expense borne by the Brownsville Company, thereby rendering said contract burdensome and unprofitable to Applicant.

(12) Applicant is an independent short line, depending solely upon its own operations for its operating and maintenance costs; it is wholly without credit and its continuous and continued operation exacts that it be relieved from every contract of every sort which is burdensome to Applicant and which deprives it of traffic, when such relief may be properly accorded to Applicant.

(13) In the exercise of its rights under said agreement and supplement thereto said Brownsville Company and Trustee in the operation thereof compete with Applicant for all freight originating at Corpus Christi and at Robstown, Texas, as well as at intermediate points on the line of Applicant, and which said Brownsville Company and Trustee are enabled to serve only by reason of the existence of said contract and supplement. Said competition deprives Applicant of revenues originating and terminating on its own line and which Applicant would receive without incurring any operating expense not necessarily now incurred.

(14) The equal privileges for switching in the terminals at Corpus Christi have become burdensome to Applicant, in this: Trainmen employees of Applicant are asserting claims against Applicant to be paid by Applicant for all switching done in the terminals of Applicant by Browns-

ville Company and by said Trustee. Applicant has denied its liability for such claims, but they are being pressed against the Applicant and to be retroactive. Said trainmen are demanding and have demanded that Applicant either terminate said contract giving rights to said Brownsville Company and operation thereof in the terminals of Applicant at Corpus Christi, or that Applicant shall pay to its trainmen employees for the full service done in said terminals by said Brownsville Company and its Trustee, as though said service had been performed by Applicant. The [fol. 32] outcome of said demand, so far as retroactive compensation is concerned, is now uncertain, but Applicant is of opinion, based upon rulings in other cases by the Railroad Adjustment Board upon claims of employees for compensation where work was done upon the tracks of the owning carrier by another under contract, that Applicant could not afford to hazard its being required to pay such compensation, especially after demand by said employees that the contract be terminated, for the financial condition of Applicant is such that should it be required to pay its employees for past services performed by the Brownsville Company and by the Trustee on the tracks of the Applicant at Corpus Christi, the danger of and the necessity for receivership would become real.

(15) Because of the facts aforesaid, and believing it imperative in the public interest and for the continued operation by Applicant without the hazard of a receivership, Applicant exercised its right of cancellation upon twelve months notice authorized by said contract, and on November 1, 1940, gave notice to the said H. R. Safford, Senior Executive Assistant of the Brownsville Company and of said operations by said Guy Thompson, Trustee, of the purpose and intention of Applicant to exercise its right to cancel said contract at the expiration of twelve months from said date, receipt of which was acknowledged by said Senior Executive Assistant in charge of operations.

G

Correspondence in regard to this Application should be addressed to J. D. Dodson, General Counsel, The Texas Mexican Railway Company, 1822 Smith-Young Tower, San Antonio, Texas.

H

Applicant is organized under the laws of Texas and is authorized to operate in Texas only.

I

The Board of Directors of Applicant on June 25, 1941, ratified the giving of said notice and authorized the filing of this Application by Resolution duly enacted at a meeting [fol. 33] of the Board of Applicant at its general offices in Laredo, Texas.

J

Applicant is not operated by a Receiver.

K

There is attached to this Application as part thereof "Exhibit No. 1", which shows a map drawn to scale of the line of railway over which said Brownsville Company and Guy Thompson, Trustee, now operate under the provisions of said contract and supplement thereto.

Premises considered, Applicant respectfully prays for issuance of proper notice hereof, and that upon a hearing Applicant be permitted to exercise the right given to it by said contract to cancel the same on November 1, 1941, which is twelve months after notice of such cancellation as provided by said contract, and that such cancellation by Applicant be approved.

Respectfully submitted, The Texas Mexican Railway Company, (Signed) by M. M. Leyendecker, Vice President and General Manager.

Attest: (Signed) G. B. Winch, Secretary. (Seal.)

State of Texas,
County of Webb:

M. M. Leyendecker, having been first duly sworn, upon his oath says: My name is M. M. Leyendecker; I reside in the City of Laredo, Webb County, Texas; I am the duly elected, qualified and acting Vice President and General Manager of The Texas Mexican Railway Company, Applicant in the foregoing Application to the Interstate Commerce Commission for a Certificate of Public Convenience

and Necessity, authorizing and approving cancellation of that one certain contract between Applicant and St. Louis, Brownsville & Mexico Railway Company entered into November 1, 1904, and one certain supplement thereto entered [fol. 34] into October 1, 1914, with respect to trackage rights over and upon the tracks of Applicant between Corpus Christi and Robstown, Nueces County, Texas; I have personal knowledge of the facts set forth in the foregoing Application and the same are true within my knowledge, except where made upon information and belief, and those I verily believe to be true; I have been directed by Resolution of the Board of Directors of Applicant to execute and file said Application in behalf of Applicant.

(Signed) M. M. Leyendecker

Sworn to and subscribed before me this the 31st day of July, 1941. (Signed) L. L. Leyendecker, Notary Public, Webb County, Texas. (Seal.)

(Clerk's Note: Here follows a Map marked Exhibit #1, showing the track, which appears in Vol. 1, page 156, of the Stenographer's Statement of Facts.)

[File endorsement omitted.]

[fol. 35] In District Court of Nueces County

[Title omitted]

Response of Defendants to Demand for Admission of Facts—Filed October 1, 1942

Now come defendants, The St. Louis, Brownsville & Mexico Railway Company and Guy A. Thompson, as Trustee of The St. Louis, Brownsville & Mexico Railway Company, and in response to a demand for admission of facts filed by plaintiff in said cause and served upon defendants on July 8th, 1942, say:

1

Defendants admit that prior to and on November 1, 1904 and continuously thereafter, the plaintiff, The Texas Mexican Railway Company, and defendant, The St. Louis, Brownsville & Mexico Railway Company, each was and

has been a corporation organized under the laws of Texas and engaged as a common carrier in interstate commerce; this admission is qualified by the statement that on June 22nd, 1933, L. W. Baldwin and Guy A. Thompson were appointed by the District Court of the United States, for the Eastern Division, Eastern Judicial District of Missouri, Trustees, and ordered to take charge of property of the St. Louis, Brownsville & Mexico Railway Company, and to operate the same, under Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy; that they qualified by taking oath and giving bond as required, and jointly operated said railroad property as trustees until December 26, 1935, at which time the resignation of L. W. Baldwin was accepted by the court and it was ordered by the Court that Guy A. Thompson continue as sole trustee; and said Guy A. Thompson has since the date last mentioned, continuously managed and operated the properties of said defendant.

[fol. 36]

2

Defendants admit that all operations of defendant, Guy A. Thompson, Trustee, over the railroad tracks, switches, and spurs of plaintiff, have been as trustees for defendant, The St. Louis, Brownsville & Mexico Railway Company.

3

Defendants admit that defendant, The St. Louis, Brownsville & Mexico Railway Company, did not on November 1, 1904, or at any time since said date own any railroad track of its own entering the City of Corpus Christi, Texas, and that said defendant did not and does not control any railroad track entering the City of Corpus Christi, Texas, except by virtue of a contract or contracts with another railroad or railroads which do own such tracks.

4

Defendants do not admit that H. R. Safford is the chief executive operating agent in Texas for the Missouri Pacific Railroad Company, but do admit that he is the chief operating official in Texas for Guy A. Thompson, as Trustee for The St. Louis, Brownsville & Mexico Railway Company and for the San Antonio, Uvalde & Gulf Railroad Company.

5

Defendants admit that Guy A. Thompson, as Trustee for each The St. Louis, Brownsville & Mexico Railway Company and for the San Antonio, Uvalde & Gulf Railroad Company, was appointed and is acting by virtue of reorganization proceedings but aver that said proceedings were under Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy.

6

Defendants have not sufficient knowledge to enable them either to admit or to deny that from November 1, 1904, to January 1, 1919, there was not any community of interest or control between Defendant, The St. Louis, Brownsville & Mexico Railway Company, and the San Antonio, [fol. 37] Uvalde & Gulf Railroad Company.

7

Defendants admit that the San Antonio, Uvalde & Gulf Railroad Company is a railroad corporation organized under the laws of Texas and as such operates and has been operating for more than 20 years a line of railway into the City of Corpus Christi, Texas, crossing the line of The St. Louis, Brownsville & Mexico Railway Company at Odem, Texas; this admission is made with the qualification that since June 22, 1933, said railroad has been operated by a trustee or trustees, appointed by the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri.

8

Defendants admit that at or about the same time trustees were appointed for the St. Louis, Brownsville & Mexico Railway Company, the same trustees were appointed for the same purpose for the San Antonio, Uvalde & Gulf Railroad Company, but aver that said proceedings were had, not "under Section 77 (b) of the Bankruptcy Act," but under Section 77 of Chapter VIII of said act.

9

Defendants admit that the defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway

Company, now is and continuously since his appointment as Trustee for the defendant, The St. Louis, Brownsville & Mexico Railway Company, has been Trustee for the San Antonio, Uvalde & Gulf Railroad Company.

10

Defendants admit that during the entire time Defendant, Guy A. Thompson, Trustee, has been operating as such for the defendant, The St. Louis, Brownsville & Mexico Railway Company, and for the San Antonio, Uvalde & Gulf Railroad Company, a substantial portion of the freight traffic into and out of Corpus Christi via defendant, The St. Louis, Brownsville & Mexico Railway Company, has [fol. 38] moved over the rails of the San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi.

11

For lack of information defendants neither admit nor deny that no certificate of public convenience and necessity has been issued by the Interstate Commerce Commission finding it to be necessary or to the public interest that freight traffic into and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway should move over the rails of the San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi.

12

Defendants admit that on all freight traffic into and out of Corpus Christi via the defendant, The St. Louis, Brownsville & Mexico Railway Company moving over the rails of the San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi, the Defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, shares with Guy A. Thompson, Trustee for the San Antonio, Uvalde & Gulf Railroad Company, a division in freight revenue on such traffic.

13

Defendants deny that neither Guy A. Thompson, Trustee, of The St. Louis, Brownsville & Mexico Railway Company, nor defendant, The St. Louis, Brownsville & Mexico Railway Company, pays the plaintiff any compensation on

freight traffic moving into and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway over the rails of The San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi.

14

Defendants admit that defendant, Guy A. Thompson, Trustee for the St. Louis, Brownsville & Mexico Railway Company, through his operating agents, has daily since November 1, 1941, directed train operatives to go upon that [fol. 39] portion of plaintiff's track necessary for the operation of the trains of said defendant between Corpus Christi and Robstown, in accordance with the contract entered into between The St. Louis, Brownsville & Mexico Railway Company and The Texas Mexican Railway Company, dated November 1, 1904, and the written amendments thereof and supplements thereto.

15

Defendants deny that since November 1, 1941, train operatives of the defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, go upon tracks of plaintiff with locomotives and trains at will without regard for the orders of plaintiff and its agents.

16

On information and belief, defendants admit that Exhibit #1 attached to plaintiff's demand is a true copy of an application which plaintiff prepared and tendered to the Interstate Commerce Commission for filing.

17

Defendants admit that copies of said application referred to in Paragraph 16 next preceding were furnished attorneys for defendant, The St. Louis, Brownsville & Mexico Railway Company, and Mr. H. E. Safford, Senior Executive Assistant, Union Station, Houston, Texas and Mr. H. H. Larimore, Interstate Commerce Counsel, Missouri Pacific Building, St. Louis, Missouri, in August 1941.

18

Defendants admit that Mr. H. H. Larimore referred to in Paragraph 17 next preceding is the Interstate Commerce

Counsel for the Missouri Pacific Railroad Company and for the defendants.

19

Defendants admit that Exhibit #2 was written by the Secretary of the Interstate Commerce Commission in response to the tender by Plaintiff of the application (Exhibit #1), and a copy of said letter was sent to Mr. H. R. Safford, St. Louis, Brownsville & Mexico Railway Company, Houston, Texas.

[fol. 40]

20

On information and belief, defendants deny that the Interstate Commerce Commission ruled in response to the tender of Plaintiff to file the application (Exhibit #1) that its jurisdiction extends only to abandonment of operations by The St. Louis, Brownsville & Mexico Railway Company.

21

Defendants admit that Mr. H. R. Safford, Senior Executive Assistant, Missouri Pacific Lines, Houston, Texas, received from Mr. M. M. Leyendecker, Vice-President and General Manager for plaintiff, a letter dated November 5, 1941, reading as follows:

"Dear Mr. Safford:

In a letter dated October 28, 1940, I notified you, Mr. H. M. Lull of the T. & N. O. Ry. Company and Mr. A. D. Mims of the San Antonio and Aransas Pass Ry. Company of this carrier's intention to cancel and terminate that certain contract dated November 1, 1904, and all supplemental contracts and memorandums of agreement thereto, concerning their use of rails or tracks of The Texas Mexican Railway Company in its yard at Corpus Christi, Texas, and between Corpus Christi and Robstown, Texas, said cancellation to be effective November 1, 1941.

We have not to this date received from you any definite statement as to what you propose to do and we find you still operating on our rails. As the cancellation became effective November 1, 1941, and there is a daily accruing liability by reason of your occupancy of these rails, this is to advise you that effective this date there will be a daily charge of $500.00 a day for the use by you of these

facilities. I desire to further advise you the other interested parties mentioned in the first paragraph of this letter have notified us that they will waive any further notice and join us in application to the I. C. C. for approval of the cancellation of the contract. We trust you will be willing to do likewise."

[fol. 41]

22

Defendants neither admit nor deny that Mr. Safford was requested to join plaintiff in an application to the Interstate Commerce Commission, but as to Paragraph 22 of plaintiff's demand for admission, refers to the copy of the letter written by Mr. Reyendecker as set forth in the next preceding paragraph hereof.

23

Defendants are not able to admit or deny that they are one of a group of lines controlled by the Missouri Pacific Railroad Company. In this connection these defendants state that the St. Louis, Brownsville & Mexico Railway Company is a corporation, organized under and by virtue of the laws of the State of Texas, and that its capital stock is transferable by indorsement and delivery of certificates of such stock; and these defendants are not able to say just what persons own its stock at the present time.

24

Defendants admit that Mr. Safford in writing on November 29, 1941 addressed to the Vice-President and General Manager of Plaintiff, acknowledged receipt of the notice of November 5, 1941, referred to in Paragraph 21 above, and stated with respect to the $500.00 per day charge for use of facilities: "We are not agreeable to accepting a daily charge of $500.00 per day for use of The Texas Mexican facilities, or any other charge except such as may be in accordance with the contract of November 1, 1904, as supplemented or amended to date."

25

Defendants admit that defendant, Guy A. Thompson, intends to continue the use of the facilities described in a contract between Plaintiff and The St. Louis, Brownsville &

Mexico Railway Company, of date November 1, 1904, as supplemented and amended, so long as may be required by law.

[fol. 42]

26

Defendants admit that defendants do not at present intend to make any application to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity permitting the defendants or either of them to abandon operations on the lines of plaintiff by reason of its notice of cancellation of the contract of November 1, 1904, together with supplements and amendments thereto.

27

Defendants are not able either to admit or to deny that if all freight traffic into and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway should move over the rails of plaintiff between Robstown and Corpus Christi, the revenue to plaintiff provided by the contract of 1904 and its supplements would be grossly in excess of the revenue received by plaintiff on such freight between November 1, 1940 and November 1, 1941.

28

Defendants deny that neither of them has paid any compensation to plaintiff for the use of its facilities in Corpus Christi since November 1, 1941, but aver that in a division of freight charges on individual shipments plaintiff has received a very large sum of money during the period mentioned. These defendants admit that since November 1, 1941, nothing has been paid by them to plaintiff under the terms of the contract of November 1, 1904, but aver that it is not possible for these defendants to pay plaintiff the compensation due under said contract unless and until plaintiff submits to defendants a properly itemized statement of the amount due each month, as required by the terms of said contract.

29

Defendants deny that the routing of freight into and out of Corpus Christi via the San Antonio, Uvalde & Gulf Railroad Company instead of via plaintiff line between Robstown and Corpus Christi is due to a community of owner-

ship or control between the St. Louis, Brownsville & Mexico Railway Company operations and the San Antonio, Uvalde [fol. 43] & Gulf Railroad Company operations.

The St. Louis, Brownsville & Mexico Railway Company. Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, by Andrews, Kelley, Kurth & Campbell, Jno. C. North, and E. H. Crenshaw, Jr., Their attorneys of Record, Defendants.

Duly sworn to by E. H. Crenshaw, Jr. Jurat Omitted in printing.

[File endorsement omitted.]

[fol. 44] In District Court of Nueces County,

[Title omitted]

Plaintiff's First Amended Original Petition—Filed April 9, 1943

Now comes The Texas Mexican Railway Company, a private railroad corporation duly incorporated under the laws of Texas and domiciled in Webb County, Texas, hereinafter called Plaintiff, complaining of St. Louis, Brownsville & Mexico Railway Company, a private railroad corporation duly incorporated under the laws of Texas, owning and operating a line of railway through Nueces County, Texas, and of Guy Thompson, Trustee for said St. Louis, Brownsville & Mexico Railway Company, hereinafter called Defendants, and by leave of Court plaintiff files this its First Amended Original Petition in lieu of and superseding its original petition heretofore filed and to which original petition each Defendant has heretofore duly answered herein, rendering service of process on this amendment unnecessary, and for its cause of action Plaintiff represents to the Court:

I

That prior to and on November 1, 1904, and continuously therefrom and now Plaintiff was, has been and is engaged in owning and operating a line of railway in and through Nueces County, Texas, said line commencing in Corpus

Christi and extending westerly from Corpus Christi to Robstown, Texas; thence to Laredo, Texas. The Defendant Brownsville Company on said November 1, 1904, and until about March 31, 1933, operated its trains over the tracks of Plaintiff from Corpus Christi to Robstown under and subject to rights of one certain contract and supplement thereto hereinafter described.

On or about March 31, 1933, Defendant Thompson, Trustee, took over operation of said Brownsville Company [fol. 45] trains and yet operates same as said Trustee.

Defendant Guy Thompson, Trustee, is now operating the trains of Defendant St. Louis, Brownsville & Mexico Railway Company pending certain reorganization proceedings duly instituted in the District Court of the United States at St. Louis, Mo.; H. R. Safford is the chief acting operating agent of said Trustee with respect to said St. Louis, Brownsville & Mexico Railway Company operations, and is the duly elected and acting Vice-President of the St. Louis, Brownsville & Mexico Railway Company, and each is actively directing subordinate employees to exercise rights and privileges and to operate trains in the yards of Plaintiff at Corpus Christi and upon its tracks, over its protest and without lawful right, all as is hereinafter fully set forth.

II

(a) On or about November 1, 1904, said Brownsville Company having no railroad track of its own entering the City of Corpus Christi, Texas, and desiring the right to enter said City over the tracks of Plaintiff, entered into one certain written contract with Plaintiff whereby Plaintiff granted to said Brownsville Company, upon the terms and subject to the conditions and limitations in said written contract set forth, a true copy of which is hereto attached as Exhibit 1 and made part hereof for all proper purposes, the right to operate its trains over the main line, side tracks and passing tracks, as well as the right to use jointly with Plaintiff its water stations, switches, real estate and all other property and appurtenances as they then existed (unless otherwise provided for in said agreement), which were incident and necessary to the use by the Brownsville Company for the purpose of running its passenger and freight trains over said line of Plaintiff, extending from the center of the crossings of the railroad tracks of the two

parties at Robstown, Texas, to the eastern end of the tracks of Plaintiff, being a distance of 16 miles, 2056 feet, includ-
[fol. 46] ing the right to use the terminals of Plaintiff at Corpus Christi, and the right to the Brownsville Company to carry over said track such freight, mail, express and passengers as it should desire for its own use and compensation, and the right to generally transact its business as a common carrier over said line, all more fully set forth in Article 1 of said contract.

(b) Among other conditions and limitations upon which said grant was made and which were expressly set forth in said contract were the following: Engines and cars of said Brownsville Company were to be managed by its employees, subject, however, to the reasonable rules and directions of operating officers of Plaintiff, more fully set forth in Article 2 thereof.

(c) Said contract took effect November 1, 1904, and was to continue for 50 years from said date, unless sooner terminated by the parties, with all its conditions and limitations inuring to the benefit of and becoming binding upon their respective successors and assigns; with the express additional stipulation that said contract could be terminated by either party without giving any reason therefor upon giving 12 months notice of its intent to terminate the same, as more fully set forth in Article 12 thereof.

(d) Said notice of cancellation and the assent of Defendant St. Louis, Brownsville & Mexico Railway Company thereto was a material consideration for the execution of said contract by Plaintiff, and a period of 12 months was fixed by said Brownsville Company and assented to by Plaintiff in order that, in event of cancellation under said clause, said Brownsville Company would have sufficient time to construct an independent line between Robstown and Corpus Christi, and the refusal of Defendants to now respect said cancellation clause constitutes a breach of said contract and a refusal to abide, a material consideration upon which said Brownsville Company procured said contract.

[fol. 47] III

(a) Thereafter and on or about October 1, 1914, Plaintiff, and said Brownsville Company, and Frank Andrews as Receiver of said Company, entered into an agreement

supplementing said original contract, a true copy of which is hereto attached marked Exhibit 2 and made part hereof for all proper purposes, whereby, among other things, Plaintiff, upon the terms and conditions and limitations therein set forth, extended the rights of said Brownsville Company and its Receiver to operate trains over the main line, side tracks and passing tracks, and to use various industry tracks jointly with Plaintiff from the center of the crossing of the lines of said two railroads at Robstown to the western yard limit of Plaintiff at Robstown, being to a point 1000 feet West of the West switch stand of Plaintiff at Robstown, together with all tracks and spurs in said yard limits, as more fully set forth in Paragraph 1 of said supplemental agreement.

(b) Article 4 of said original contract, subdivision (a), was amended in certain respects not here necessary to set forth, but the same is fully set forth in Paragraph 3 of said supplemental agreement.

(c) Said original contract was specifically referred to in and was made applicable to said supplemental agreement, where not inconsistent with its terms and provisions, as more fully set forth in Paragraph 4 of said supplemental agreement. Nothing was contained in said supplemental agreement inconsistent with the express conditions and limitations above set forth in Article 12 of said orginal contract which reserved to both parties the unconditional right of cancellation upon 12 months notice, and Defendants are each given notice to produce orginal copies of said contract and supplement upon any trial of this cause or secondary evidence thereof may be offered in evidence.

(d) At the time said contract was executed and for many years thereafter said Brownsville Company had no means [fol. 48] of entering the City of Corpus Christi with its own trains except thru exercise of the rights conferred upon it by said contract, but the Defendant Trustee now operates practically all of said Brownsville trains which enter Corpus Christi over tracks of the S. A. U. & G. Railroad Company which is owned or controlled by Missouri Pacific Railway Company, which also owns or controls said Brownsville Company, both of which are being operated and controlled by the Defendant Trustee pending reorganization as aforesaid.

(e) The compensation to be paid to Plaintiff by said Brownsville Company for the rights granted to it by said contract was fixed at $3277.80 per year, plus one-half of all taxes levied and charged against the property jointly used under said contract, plus a proportion of the actual cost of maintaining said tracks and buildings, and of agents, telegraph operators, clerks, and other expenses at Robstown and at Corpus Christi, and at intermediate stations jointly used, to be determined by that sum which bears the same proportion to the entire cost as the number of passenger and freight cars moved over said road between said points by said Brownsville Company should bear to the total number of cars moved by it and by plaintiff over said road between said points. Said contract stipulation that maintenance should include repairs and renewals of tracks, and that no expense for such purpose above the sum of $250.00 in any one month could be paid by Plaintiff without consent of said Brownsville Company except in cases of specified emergency, none of which included necessary renewal of tracks resulting from wear and tear.

(f) Said contract was made with the understanding of both parties thereto, and it was then so contemplated by the parties thereto, that said Brownsville Company would make exclusive use of said tracks and property of Plaintiff for movement and handling of all cars into and out of Corpus Christi routed via said Brownsville Company and its successors, which was done until the Missouri Pacific Railroad Company acquired control of both said Brownsville [fol. 49] Company and said S. A. U. & G. Company. After acquiring said controls said Brownsville Company and the Defendants gradually withdrew regular operations of all trains and cars from the main line of Plaintiff between Robstown and Corpus Christi, except one passenger train per day each way, and transferred operations of said cars and trains routed via said Brownsville Company into and out of Corpus Christi over the S. A. U. & G. Railroad. Defendants thereby voluntarily abandoned the principal operations under said contract which produced a compensating consideration to Plaintiff at the time said contract was made and thereby escaped performance of a substantial part of the consideration promised and obligated by which said contract was procured, yet retained the privi-

leges and benefits accruing to Defendants from said contract.

(g) At the time said contract was made the roadbed and rails of Plaintiff from Robstown to Corpus Christi were designed to withstand at a reasonable maintenance cost the wear and tear imposed by motive powers of the respective sizes used by Plaintiff and by said Brownsville Company, and it was not contemplated that in the exercise of the rights conferred by said contract said Brownsville Company would thereafter subject said track to excessive and unreasonable wear and tear caused by the rapid movement over said tracks of motive power of substantially greater weight than for which said track was designed, as Defendants did and are doing, particularly in the operation of said passenger trains nor, if such should be done, that the Defendants would at the same time divert practically all slower moving cars handled by the Brownsville Company in and out of Corpus Christi, thus shifting to Plaintiff the major portion of the excess cost directly imposed by Defendants using heavier motive power at higher speeds than the track was and is designed for, as Defendants have done, to the great damage of Plaintiff.

(h) The rights secured to said Brownsville Company asserted by Defendants under said contract with respect to [fol. 50] movement of cars over the tracks and passing tracks of Plaintiff, which include the yards and terminals of Plaintiff at Corpus Christi, were solely with respect to cars moving thereto and therefrom by said Brownsville Company as delivering or originating carrier. Said contract did not authorize and does not authorize said Brownsville Company nor Defendant Trustee after having gained access to said tracks and terminals of Plaintiff through said contract and supplement to handle as a switcher thereof cars which move into or out of Corpus Christi over other lines, particularly over the S. A. U. & G. but Defendants wrongfully and without regard or respect for the rights of Plaintiff, and over its protest, have used and now use said tracks and terminals to switch cars into and out of said yards and to spot such cars on said tracks, which cars move into and out of Corpus Christi over lines other than said Brownsville Company. Plaintiff does not have knowledge of the numbers, weights and dates of said

cars moved into and out of Corpus Christi and of cars handled in the yards of Plaintiff not moving via Brownsville Company, but Defendants and each thereof do have, so Plaintiff is informed and believes, and Plaintiff asks for an accounting of such movements for each day since June 1, 1940.

IV

(a) Prior to October 28, 1940, operating Railway Brotherhoods holding labor contracts with Plaintiff demanded of Plaintiff that it cancel said operating contract and supplement and refuse to permit any further operations upon or over the above described tracks of plaintiff except through its own employees under threat of claims being made against Plaintiff for back pay for all operations which had been conducted upon and over said tracks in said yards at Corpus Christi by Defendants, and claiming future compensation with respect to all future similar operations. Said demand was based upon the claim of said employees of their right to perform all said work and, if sustained, would impose an award against Plaintiff in [fol. 51] excess of $50,000.00 which this Plaintiff has no reasonable expectation of being able to pay. Not desiring to antagonize its own employees nor to hazard a decision of said claim before the Railway Labor Adjustment Board, and being unable to finance itself in event of an adverse decision to it by said Board upon said claim, and knowing of said operations over the St. L. B. & M. Railroad into and out of Corpus Christi by Defendants, and that said contract rights were being used by Defendants in so far as profitable to Defendants, while avoiding obligations of benefits to Plaintiff, and having expressly reserved to itself the right of cancellation of said contract after twelve months notice, Plaintiff agreed with its employees to and did give written notice on October 28, 1940, exercising its right to terminate and cancel said contract and supplement effective twelve months after November 1, 1940.

(b) Said notice was in writing addressed to Mr. H. R. Safford, Senior Executive Assistant, The St. Louis, Brownsville & Mexico Railway Company, who was and is its vice-president and the chief operating officer representing the Defendant Trustee in the State of Texas with respect to its operations above set forth; and he acknowledged receipt of said notice on October 31, 1940. Each Defendant

is given notice to produce the original of said notice and of said contract and supplement upon each hearing and each trial of this cause; otherwise secondary evidence of the contents of each will be offered in evidence.

V

(a) Defendants have continuously since November 1, 1941, over the protest of Plaintiff, continued and now continue to use the tracks in the yards of Plaintiff in such fashion as suited and as suits the desires of Defendants. They daily go upon said tracks with locomotives and trains at will, without regard for the orders of Plaintiff and its agents, and in defiance of the rights of Plaintiff. Defendants daily order switch engines, trains and crews of their [fol. 52] own into said yards and at will drive the same over and upon the tracks of Plaintiff without orders from or obedience to the officers and agents of Plaintiff, and thereby create confusion in said yards and interfere with the orderly operations of Plaintiff upon its own tracks, endangering the lives and safety of Plaintiff's employees and property, unless Plaintiff submits to the unlawful and forcible interference with, appropriation and use of Plaintiff's property by Defendants and by each of them as aforesaid.

(b) At the time said Contract and supplement thereto were executed, was in all respects legal and valid, and no law has since been enacted which impairs or which purports to impair the obligations of said contract, and the same with its cancellation clause was legal and was in full force and effect both at the time Plaintiff gave its notice of cancellation and on November 1, 1941, on which date the right of Defendants and of each of them to enter upon and use the property of Plaintiff ended, and there remained in neither Defendant any right of election or choice to longer continue said use under claim of right by virtue of said contract.

(c) After Defendants continued and refused to discontinue said entry and use as aforesaid Plaintiff gave them notice that for each day they should continue such use it would be at a cost to Defendants of $500.00 per day. With said notice Defendants arbitrarily wilfully and capriciously continued and now continue such use and asserted to Plain-

tiff that the cost of such use fixed by Plaintiff would not be recognized by Defendants and that they would pay only in accordance with said contract, which Plaintiff says it had cancelled and which was and is no longer in effect. Plaintiff says that it had and has the right upon the facts in this petition set forth to prescribe the value of the use of its property appropriated and used by Defendants and each of them over the protest of Plaintiff, and that neither Defendant had the lawful right to longer impose upon Plaintiff the original contract nor to claim the use to be [fol. 53] lawful after having affirmatively refused to agree to the payment for the use which Plaintiff proposed, and in entering upon and using Plaintiff's property after November 1, 1941, each Defendant so doing became and now is a voluntary trespasser upon said property and liable and bound to pay to Plaintiff all damages imposed upon Plaintiff, plus the reasonable value of the use of said property, and exemplary damages by reason of the arbitrary, ruthless and capricious acts as aforesaid.

(d) The privileges exercised and the uses made by Defendants and by each of them with respect to Plaintiff's property subsequent to November 1, 1941, as aforesaid, are valuable property rights which are being usurped and enjoyed without due process of law and constitute a flagrant disregard for and violation of the constitutional guarantees to Plaintiff by Articles 15 and 16, Section 1 of the Constitution of the United States, and by Article 1, Section 19 of the Constitution of Texas, that the property of Plaintiff shall be taken only thru due process of law.

VI

(a) Plaintiff alleges upon information and belief that employees of Defendants have demanded that they continue and refuse to discontinue use of and operations upon the property of Plaintiff as aforesaid and that Defendants fear if they should discontinue such operations as they were conducting during the existence of said contract, their own employees will assert claims against them for pay from Defendants as tho their employees had performed all work on the tracks of Plaintiff which its employees would perform if Defendants discontinued using and operating upon said tracks as aforesaid, and Defendants and each of them have wrongfully and purposely and knowingly

continued said operations without lawful right in an effort to avoid the hazard of a controversy with employees over work performed upon the tracks and property of Plaintiff in utter disregard for the rights of Plaintiff in the premises.

(b) Plaintiff alleges that it proposed to Defendants that it would withdraw said cancellation notice if Defendants [fol. 54] would agree to indemnify Plaintiff against any loss it might susttain as result of an award against it by the National Railroad Labor Adjustment Board in event the employees of Plaintiff successfully prosecuted their claim for conipensation for all work done upon the rails of plaintiff by the crews of the Defendants, but Defendants refused to agree to assume any liability.

VII

(a) Plaintiff says that it is entitled to judgment jointly and severally against the Defendants for damages in the sum of $500.00 per day for each and every day of such use.

(b) In event it be held that Plaintiff is not entitled to recover said $500.00 per day, Plaintiff then says, in the alternative, that it is entitled to recover, jointly and severally, against the Defendants the reasonable value of the use of said property to Defendants, there being no market rental value for said property, and which value Plaintiff says is $5,000.00 per month for each and every month since the notice of cancellation became effective under the contract.

(c) Plaintiff further says that in either event it is entitled to have judgment against the Defendants, jointly and severally, establishing their several liability to plaintiff for the amount of any award with interest which employees of Plaintiff may establish against it for work performed by employees of Defendants or either of them on the said property of Plaintiff after expiration of said notice of cancellation.

(d) Plaintiff further says that it is entitled to recover exemplary damages against the Defendants jointly and severally for their wilful disregard of the rights of Plaintiff, and of the wilful appropriation to Defendants of the

use of Plaintiff's property in disregard for the contract obligation of Defendants to respect the notice of cancellation given by Plaintiff, such exemplary damages to be awarded for each and every day the Defendants have, over [fol. 55] the protest and objection of Plaintiff, appropriated and used its property.

(c) Plaintiff says that it is entitled to recover interest at the rate of 6% per annum from November 1, 1942 to date of judgment on whatever judgment is awarded for the use of said property from November 1, 1941 to November 1, 1942, and interest on whatever judgment may be awarded from the date thereof until paid at the rate of 6% per annum.

VIII

Plaintiff says that it could lock its switches and meet Defendants and their employees with force by which, alone, Plaintiff may keep Defendants and each of them and their employees and trains off Plaintiff's tracks, but Plaintiff does not do so because Plaintiff fears such course would lead to physical violence and personal injury and property damage, and in order to be protected against the arbitrary and unlawful and wilful acts of Defendants and each of them as aforesaid Plaintiff is without adequate remedy at law and invokes the aid of equity.

Wherefore, premises considered, Defendants each having heretofore duly answered, Plaintiff prays upon a hearing that it recover judgment:

(a) Enjoining each Defendant, jointly and severally, together with the agents, servants and employees of each several Defendant, from going upon or from sending motive power and employees of either Defendant upon any track, side track or terminal of Plaintiff in the City of Corpus Christi or from Corpus Christi to Robstown in the absence of affirmative consent from Plaintiff.

(b) That it recover its judgment, jointly and severally, against the Defendants for damages in the sum of $500.00 per day for each and every day said property of Plaintiff has been used by Defendants or either of them since November 1, 1941.

(c) In event it be held that Plaintiff is not entitled to recover said $500.00 per day, Plaintiff then prays, in

the alternative, that it recover, jointly and severally, [fol. 56] against said Defendants the reasonable value of the use of said property to Defendants from November 1, 1941 until said property be vacated by the Defendants and unmolested possession and use be surrendered and returned to plaintiff.

(d) Plaintiff further prays in any event that it have judgment jointly and severally, against the Defendants establishing their respective joint and several liabilities to Plaintiff for the amount of any award with interest thereon which may be awarded employees of Plaintiff against Plaintiff as compensation for work performed by employees of Defendants or either thereof on the property of Plaintiff as aforesaid.

(e) Plaintiff further prays that it recover in any event exemplary damages against the Defendants, jointly and severally, at the rate of $50.00 a day for each and every day they or either thereof have made use of Plaintiff's property as aforesaid from and after November 1, 1941.

(f) Plaintiff further prays for interest at the rate of 6% per annum from November 1, 1942 to date of judgment on whatever judgment is awarded for the use of said property from November 1, 1941 to November 1, 1942, and interest on whatever judgment may be awarded from the date thereof until paid at the rate of 6 % per annum.

(g) Plaintiff further prays for its costs and for general relief.

Dodson, Ezell & Duke, Kleberg, Eckhardt, Mobley & Roberts, Tarlton & Koch, Elmore H. Borchers, Attorneys for Plaintiff.

[fol. 57] Two copies of the foregoing Amended Petition have been delivered to E. H. Crenshaw, Jr., Attorney of Record for Defendants, and use of Attorneys for Defendants.

———, Attorneys for Plaintiff.

Duly sworn to by J. D. Dodson. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 58] In District Court of Nueces County

[Title omitted]

Plea of Defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company—Filed July 30, 1943

Now comes Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, a defendant in the above numbered and entitled cause and presents this his plea to the jurisdiction of this Court over the subject matter of this suit (without waiving but expressly reserving unto himself the right to seek in the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, or any other court having jurisdiction of such application, appropriate relief from the further prosecution of the above entitled and numbered cause); and in support of such plea this defendant respectfully shows to the Court:

1

That The St. Louis, Brownsville and Mexico Railway Company is a corporation duly organized and existing under and by virtue of the laws of the State of Texas, the purpose of its incorporation being to own, equip and operate a line of railway from Houston, Texas, to Brownsville, Texas; (with certain branches) traversing several counties in the State of Texas, including the County of Nueces in said State. That its charter was issued to it in the year 1903, and is still in full force and effect; that from the date of its incorporation, continuously to the 2nd day of May, 1933, said defendant was engaged in interstate commerce as a common carrier of freight and passenger by rail.

2

That in pursuance of the purpose of its incorporation, and that in order to serve with rail transportation the City of Corpus Christi in Nueces County, Texas, the defendant, The St. Louis, Brownsville and Mexico Railway Company, [fol. 59] on or about the 1st day of November, 1904, made and entered into a contract in writing with The Texas Mexican Railway Company, by the terms of which, for a valuable consideration therein stipulated, said defendant should have the right to use not only the tracks of said The

Texas Mexican Railway Company between the town of Robstown (a point on the main line of said defendant's railroad) to Corpus Christi, but all station facilities, side-tracks, spurs, switches and industrial tracks then owned by The Texas Mexican Railway Company at Robstown, Texas, Violet, Texas, Clarkwood, Texas, and Corpus Christi, Texas, and such facilities as The Texas Mexican Railway Company might thereafter acquire at said points, and to make use of the services of necessary dispatchers and other officials, station agents, operators and other persons employed by The Texas Mexican Railway Company whose services might be necessary in the prosecution of the business of said defendant at the various points described in said contract and along the line between Robstown, Texas and Corpus Christi, Texas.

3

That the legal and practical effect of the contract between The St. Louis, Brownsville and Mexico Railway Company and The Texas Mexican Railway Company, and the conduct of both parties to said contract in the performance of said contract and the subsequent agreements made supplemental thereto was that for many years, and continuing up until the Spring of the year 1933, the said two Railroad Companies held and enjoyed the joint use and possession of the railway line of The Texas Mexican Railway Company between Robstown and Corpus Christi, Texas, and all facilities and services of all employees connected therewith; that a fair and equitable consideration to be paid by The St. Louis, Brownsville and Mexico Railway Company was agreed upon and that such consideration was punctually paid by said Company from year to year until the Spring of the year 1933; that from the date of the formation of said original contract down to the present time the population of the City of Corpus Christi, Texas, has grown from about eleven thousand people to about one hundred thousand [fol. 60] people, and that there has been a steady increase in the growth and population of the towns of Robstown, Violet and Clarkwood in the State of Texas; and that there has been an increase in the business tendered to said two carriers approximately commensurate with the growth in population; that the physical properties at Robstown, Texas, and at Corpus Christi, Texas, and between said two cities have been substantially increased and very materially

improved in strength and quality, principally out of proceeds realized by The Texas Mexican Railway Company from the joint possession, occupancy and use of said tracks and other facilities; and that as of date the 2nd day of May, 1933, The St. Louis, Brownsville and Mexico Railway Company was and for nearly thirty years had been in peaceable possession, jointly with said Texas Mexican Railway Company of the railway lines and facilities above described, and that until said 2nd day of May, 1933 (the date of the filing of its petition for reorganization in bankruptcy), said The St. Louis, Brownsville and Mexico Railway Company had never been disturbed in such use and possession nor had its right to the continuous joint use and possession of said railway lines and facilities ever been questioned. That the joint use and possession of said railway lines and other facilities (along with the owner of the realty) had become and was a valuable and substantial property right inuring to and being a part of the assets and estate of said The St. Louis, Brownsville and Mexico Railway Company.

4

That heretofore, on, to-wit, the 31st day of March, 1933, Missouri Pacific Railroad Company filed in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri its petition alleging its inability to meet its debts at maturity and its desire to effect a plan of reorganization pursuant to Section 77 of Chapter 8 of the Acts of Congress relating to bankruptcy; and it prayed that its petition be approved as properly filed under said Section 77, and that it be granted all other and further [fol. 61] relief to which it might be entitled; that said petition was duly filed by the Clerk of said Court and docketed under the name and style of "In the Matter of Missouri Pacific Railroad Company, Debtor," and numbered No. 6935 upon the docket of said Court. That on the date of its filing the Honorable C. B. Faris, Judge of said Court, entered his order to the effect that said petition be approved as properly filed under said Section 77, and giving further orders and directions as to the conduct of the business of said Missouri Pacific Railroad Company until further orders should be entered by said Court.

5

That on the 2nd day of May, 1933, The St. Louis, Brownsville and Mexico Railway Company filed its petition in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, in a proceeding theretofore filed in said Court, styled and numbered upon the docket of said Court as "In the Matter of Missouri Pacific Railroad Company, Debtor, No. 6935," alleging that the Missouri Pacific Railroad Company, Debtor, owned approximately ninety-four per cent of the voting stock of the New Orleans, Texas and Mexico Railway Company, and that said New Orleans, Texas and Mexico Railway Company owned all of the voting stock of said The St. Louis, Brownsville and Mexico Railway Company; that said The St. Louis, Brownsville and Mexico Railway Company was without sufficient funds to pay and discharge its obligations and was unable to meet its debts at maturity, and that it desired to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company, pursuant to Section 77 of Chapter 8 of the Acts of Congress relating to bankruptcy. And it prayed an order approving its petition as properly filed under said Section 77 and that it be allowed (in connection with other petitioners) to effect a plan of reorganization in connection with or as a part of the plan of reorganization of Missouri Pacific Railroad Company, and for all other and further relief to which it might be entitled.

[fol. 62]

6

That on said 2nd day of May, 1933, the Honorable C. B. Faris, Judge of said Court, made and entered an order approving said petition as properly filed and giving orders as to the conduct of its business until such time as further orders might be entered by the court.

7

That by an order duly made and entered by the Hon. C. B. Faris, Judge of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, dated June 22nd, 1933, and denominated Order No. 70, L. W. Baldwin and Guy A. Thompson were appointed temporary trustees of all the railroads involved in said

bankruptcy proceedings, including The St. Louis, Brownsville and Mexico Railway Company.

That the Trustees named promptly qualified by taking the oath and giving the bond required, and entered upon the performance of their duties.

8

That thereafter, on, to-wit, the 26th day of July, 1933, the same Judge of said Court made and entered his order, denominated No. 57, confirming and approving the former order appointing the said L. W. Baldwin and Guy A. Thompson as temporary trustees and ordered that the said L. W. Baldwin and Guy A. Thompson be appointed permanent trustees of, all and singular, the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of the various railroad companies included in said bankruptcy proceeding, among which was named The St. Louis, Brownsville and Mexico Railway Company.

9

This defendant avers that by virtue of the proceedings above described the rights, franchises and property interests acquired and held by The St. Louis, Brownsville and [fol. 63] Mexico Railway Company, under and by virtue of the contract between it and The Texas Mexican Railway Company, of date November 1st, 1904, and the agreements thereafter made supplemental thereto, immediately passed into the custody of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, and were by the Court committed to this defendant and his co-trustee, L. W. Baldwin, along with every other franchise, right and property interest then owned, used, possessed and enjoyed by said The St. Louis, Brownsville and Mexico Railway Company; and they became a part and are now a part of the estate of said The St. Louis, Brownsville and Mexico Railway Company, in bankruptcy, and subject to the orders and disposition of said U. S. District Court.

10

That subsequently, on the 26th day of December, 1935, L. W. Baldwin tendered to the said Court his resignation as trustee and on said date the said Hon. C. B. Faris, as Judge of said Court, by his order denominated Order No.

416, accepted said resignation, effective as of 12 o'clock noon of said date, and continued in office the said Guy A. Thompson as sole Trustee; and the Court ordered that as sole trustee the said Guy A. Thompson should succeed to all the rights and liabilities of E. W. Baldwin and Guy A. Thompson as trustees of the several debtor companies (including The St. Louis, Brownsville and Mexico Railway Company); and the Court ordered that the bond of Guy A. Thompson, Trustee, in the amount previously approved, should be corrected in conformity with his order, and when so corrected, should be accepted by the Clerk of said Court. And defendants would show that said bond was so corrected and was so approved and that from and after noon of the 26th day of December, 1935, and continuing down to the present date, the said Guy A. Thompson has been and is the duly qualified and acting trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor; and as such entitled to [fol. 64] all the lands, properties, estates, rights and franchises of the said The St. Louis, Brownsville and Mexico Railway Company, of whatever character and wherever situated, including its rights, franchises, and property interests acquired by The St. Louis, Brownsville and Mexico Railway Company under and by virtue of the contract between it and The Texas Mexican Railway Company of date November 1st, 1904, and agreements thereafter made supplemental to such contract.

11

That by its pleading herein plaintiff seeks to enjoin defendant, The St. Louis, Brownsville and Mexico Railway Company, and the defendant, Guy A. Thompson, from going upon or sending motive power and employees upon any track, side-track, or terminal of plaintiff in the City of Corpus Christi or from Corpus Christi to Robstown; further to recover a judgment in the sum of Five Hundred and no/100 ($500.00) Dollars per day for each and every day said property has been used by defendants or either of them since November 1st, 1941; or in the alternative, to recover the reasonable value of the use of said property, since November 1st, 1941, and further to recover of and from defendants any sum which may be awarded against plaintiff to its employees as compensation for work done by employees of defendants or either of them on plaintiff's property; and further to recover exemplary damages at the rate of Fifty and no/100 ($50.00) Dollars per day from and after

November 1st, 1941; and further to recover interest at six (6%) per cent per annum from November 1st, 1942, to date of judgment on whatever sum is awarded for the use of said property from November 1st, 1941 to November 1st, 1942, and interest at six (6%) per cent per annum from its date on whatever judgment may be awarded; and further for costs of court.

12

This defendant avers that the purpose of plaintiff's suit and the effects of any judgment rendered by this Court granting to plaintiff the relief sought in its petition would [fol. 65] be to oust this defendant, the Trustee in Bankruptcy appointed by the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, from the possession (jointly with plaintiff) of the property above described, and to deprive this Trustee of said property, the custody and control of which he has held continuously since the 22nd day of June, 1933, under the orders of the Court appointing him, and would therefore, result in depriving said Bankruptcy Court of the possession, custody, control and disposition of property which it has held and now holds and which it is now administering.

13

This defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, avers that, the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, having in a bankruptcy proceeding already assumed and for many years exercised control over the property and property rights involved in this litigation, and having placed said property in the custody of this defendant as trustee, with whom for many years plaintiff dealt without objection, the jurisdiction of said District Court of the United States over said property is exclusive; that the possession, control and right of user held by this defendant is in fact and in law the control, possession and right of user inhering in the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, this defendant being only the officer and servant of said Court in respect of the matters herein discussed, and any effort on the part of plaintiff or any other person to destroy, impair or interfere with such control, possession and right of user would be an invasion of the jurisdiction of said

U. S. District Court over said property; and under the law of comity between courts it is not proper or lawful for this Court to invade the jurisdiction of said bankruptcy court [fol. 66] by entertaining this suit and granting any or all of the relief sought by plaintiff herein.

14

This defendant would show that in said bankruptcy proceedings, clear and reasonable provision has been made by which plaintiff may seek at the hands of said bankruptcy court all the relief prayed for in his petition, and obtain such relief if shown by the law and the facts to be entitled thereto; or plaintiff can, by appropriate application, seek at the hands of said bankruptcy court an order expressly authorizing him to prosecute this suit as against this defendant in the District Court for the 94th Judicial District, Nueces County, Texas.

15

Premises considered, this defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, respectfully moves the Court:

(1) To dismiss this action, insofar as this defendant is concerned, at the cost of plaintiff; or

(2) To order that all further proceedings in this action, insofar as they seek relief against said defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, be stayed, unless and until a proper and valid order be obtained and certified to this Court by the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, expressly authorizing that the matters in controversy herein be heard and determined by this Court as between the plaintiff and the said Trustee.

Andrews, Kelley, Kurth and Campbell, by J. L. Lockett, Jr., Jno. C. North, E. H. Crenshaw, Jr., Attorneys for Defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company.

[fol. 67] *Duly sworn to by E. H. Crenshaw, Jr. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 68] IN DISTRICT COURT OF NUECES COUNTY

[Title omitted]

MOTION TO STAY PROCEEDINGS AS TO DEFENDANT, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY CO.—Filed July 30, 1943

Now comes The St. Louis, Brownsville and Mexico Railway Company, a defendant in the above numbered and entitled cause, and moves that this Court order a stay of all proceedings in this cause; and in support of its motion, shows:

1

That said The St. Louis, Brownsville and Mexico Railway Company is a corporation duly organized and existing under and by virtue of the laws of the State of Texas, the purpose of its incorporation being to own, equip and operate a line of railway from Houston, Texas, to Brownsville, Texas, (with certain branches) traversing several counties in the State of Texas, including the County of Nueces in said State. That its charter was issued to it in the year 1903, and is still in full force and effect; that from the date of its incorporation, continuously to the 2nd day of May, 1933, said defendant was engaged in interstate commerce as a common carrier of freight and passengers by rail.

2

That in pursuance of the purpose of its incorporation, and that in order to serve with rail transportation the City of Corpus Christi in Nueces County, Texas, the defendant, The St. Louis, Brownsville and Mexico Railway Company, on or about the 1st day of November, 1904, made and entered into a contract in writing with The Texas Mexican Railway Company, by the terms of which, for a valuable consideration therein stipulated, said defendant should have the right to use not only the tracks of said The Texas Mexican Railway Company between the town of Robstown [fol. 69] (a point on the main line of said defendant's railroad) to Corpus Christi, but all station facilities, sidetracks, spurs, switches and industrial tracks then owned by The Texas Mexican Railway Company at Robstown, Texas, Violet, Texas, Clarkwood, Texas, and Corpus

Christi, Texas, and such facilities as The Texas Mexican Railway Company might thereafter acquire at said points, and to make use of the services of necessary dispatchers and other officials, station agents, operators and other persons employed by The Texas Mexican Railway Company whose services might be necessary in the prosecution of the business of said defendant at the various points described in said contract and along the line between Robstown, Texas, and Corpus Christi, Texas.

3

That heretofore, on, to-wit, the 31st day of March, 1933, Missouri Pacific Railroad Company filed in the District Court of the United States Eastern Division, Eastern Judicial District of Missouri, its petition alleging its inability to meet its debts at maturity and its desire to effect a plan of reorganization pursuant to Section 77 of Chapter 8 of the Acts of Congress relating to bankruptcy; and it prayed that its petition be approved as properly filed under said Section 77, and that it be granted all other and further relief to which it might be entitled; that said petition was duly filed by the Clerk of said Court and docketed under the name and style of "In the Matter of Missouri Pacific Railroad Company, Debtor", and numbered 6935 upon the docket of said Court. That on the date of its filing the Honorable C. B. Faris, Judge of said Court, entered his order to the effect that said petition be approved as properly filed under said Section 77, and giving further orders and directions as to the conduct of the business of said Missouri Pacific Railroad Company until further orders should be entered by said Court.

4

That subsequently, on, to-wit, the 2nd day of May, 1933, The St. Louis, Brownsville and Mexico Railway Company filed its petition in the court above named, in the proceed-
[fol. 70] ing as styled above, alleging that the Missouri Pacific Railroad Company, Debtor, owned approximately ninety-four percent of the voting stock of the New Orleans, Texas and Mexico Railway Company, and that said New Orleans, Texas and Mexico Railway Company owned all of the voting stock of said The St. Louis Brownsville and Mexico Railway Company; that said The St. Louis, Brownsville and Mexico Railway Company was with-

out sufficient funds to pay and discharge its obligations and was unable to meet its debts at maturity, and that it desired to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company, pursuant to Section 77 of Chapter 8 of the Acts of Congress relating to bankruptcy. And it prayed an order approving its petition as properly filed under said Section 77 and that it be allowed (in connection with other petitioners) to effect a plan of reorganization in connection with or as a part of the plan of reorganization of Missouri Pacific Railroad Company, and for all other and further relief to which it might be entitled.

5

That on said 2nd day of May, 1933, the Honorable C. B. Faris, Judge of said Court, made and entered an order approving said petition as properly filed and giving orders as to the conduct of its business until such time as further orders might be entered by the court.

6

That by an order duly made and entered by the Hon. C. B. Faris, Judge of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, dated June 22nd, 1933, and denominated Order No. 40, L. W. Baldwin and Guy A. Thompson were appointed temporary trustees of all the railroads involved in said bankruptcy proceedings, including The St. Louis, Brownsville and Mexico Railway Company.

That the Trustees named promptly qualified by taking the oath and giving the bond required, and entered upon [fol. 71] the performance of their duties.

7

That thereafter, on, to-wit, the 26th day of July, 1933, the same Judge of said Court made and entered his order, denominated Order No. 57, confirming and approving the former order appointing the said L. W. Baldwin and Guy A. Thompson, as temporary trustees and ordered that the said L. W. Baldwin and Guy A. Thompson be appointed permanent trustees of, all and singular, the railroad, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of the various railroad companies

included in said bankruptcy proceeding, among which was named The St. Louis, Brownsville and Mexico Railway Company.

8

That subsequently, on the 26th day of December, 1935, L. W. Baldwin tendered to the said Court his resignation as trustee and on said date the said Hon. C. B. Faris, as Judge of said Court, by his order denominated Order No. 416, accepted said resignation, effective as of 12 o'clock noon of said date, and continued in office the said Guy A. Thompson as sole trustee; and the Court ordered that as sole trustee the said Guy A. Thompson should succeed to all the rights and liabilities of L. W. Baldwin and Guy A. Thompson as trustee of the several debtor companies (including The St. Louis, Brownsville and Mexico Railway Company); and the Court ordered that the bond of Guy A. Thompson, Trustee, in the amount previously approved, should be corrected in conformity with his order, and when so corrected, should be accepted by the Clerk of said Court. And defendants would show that said bond was so corrected and was so approved and that from and after noon of the 26th day of December, 1935, and continuing down to the present date, the said Guy A. Thompson has been and is the duly qualified and acting trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, and as such entitled to all the lands, properties, estates, rights and [fol. 72] franchises of the said The St. Louis, Brownsville and Mexico Railway Company, of whatever character and wheresoever situated, including its rights, franchises, and property interests acquired by The St. Louis, Brownsville and Mexico Railway Company under and by virtue of the contract between it and the Texas Mexican Railway Company of date November 1st, 1904; and agreements thereafter made supplemental to such contract.

9

That in the bankruptcy proceedings above described the Hon. C. B. Faris, Judge of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, made and entered on May 9th, 1933, his order, denominated Order No. 18, decreeing that all persons, firms, and corporations, whatsoever and wheresoever situated, located, or domiciled, other than the Debtors, were hereby

ordered to deliver to the respective Debtors the property and premises of the respective Debtors and to make such transfers, assignments, and conveyances in connection therewith as may be necessary or proper, and were hereby restrained and enjoined from interfering with, attaching, garnisheeing, levying upon and enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, railroads, properties, and premises belonging to or in the possession of any of the Debtors, or from taking possession of, or in any way interfering with, the same, or any part thereof, or from interfering in any manner to prevent the discharge by the Debtors of their duties in the operation of said property and business under the orders of this Court.

10

That on or about the 14th day of November, 1933, the Hon. C. B. Faris, Judge of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, made and entered in said bankruptcy proceedings his order, denominated as Order No. 116, by the terms of which he did decree as follows:

"From and after the entry of this order, all suits [other [fol. 73] than claims for injuries to or death of employes], wherever pending, against any of the Debtors, shall be stayed until after final decree in this cause, and the continued prosecution of any and all suits (other than claims for injuries to or death of employes) which have for their object the enforcement of any lien or judgment against the property of the Debtors in the hands of the Trustees shall be, and the same is, hereby enjoined until after final decree entered in this cause."

11

That on the 2nd day of December, 1935, the Hon. C. B. Faris, Judge of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, made and entered in said bankruptcy proceedings his order denominated as Order No. 116-A by the terms of which he did decree as follows:

"Whereas, subdivision (j) of Section 77 of the Act relating to Bankruptcy, as amended August 27, 1935, has made necessary certain changes in orders respecting the staying of suits against the debtors, Now It Is Ordered:

"That Order No. 116, heretofore entered in these proceedings on November 14, 1933, is hereby repealed.

"That commencement of continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings, provided, however, that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated.

C. B. Faris, United States Circuit Judge for the Eighth Judicial Circuit sitting as District Judge for the Eastern Division, Eastern Judicial District of Missouri.

"Filed Dec. 2, 1935. Jas. J. O'Connor, Clerk."

[fol. 74]

12

That the orders above quoted and described have not been revoked or modified by the Judge of said U. S. District in any material manner affecting the rights of the parties to the instant case and the relief sought by plaintiff herein.

13

That by its pleading herein plaintiff seeks to enjoin defendant, The St. Louis, Brownsville and Mexico Railway Company, and the defendant, Guy A. Thompson, from going upon or sending motive power and employees upon any track, side-track or terminal of plaintiff in the City of Corpus Christi or from Corpus Christi to Robstown; further to recover a judgment in the sum of Five Hundred and no/100 ($500.00) Dollars per day for each and every day said property has been used by defendants or either of them since November 1st, 1941; or in the alternative, to recover the reasonable value of the use of said property since November 1st, 1941, and further to recover of and from defendants any sum which may be awarded against plaintiff to its employees as compensation for work done by employees of defendants or either of them on plaintiff's property; and further to recover exemplary damages at the rate of fifty and no/100 ($50.00) Dollars per day from and after November 1st 1941;

and further to recover interest at six (6%) per cent per annum from November 1st, 1942, to date of judgment on whatever sum is awarded for the use of said property from November 1st, 1941, to November 1st, 1942, and interest at six (6%) per cent per annum from its date on whatever judgment may be awarded; and further for costs of court.

14

Said defendant, The St. Louis, Brownsville and Mexico Railway Company, would show that plaintiff's suit is not a suit for damages caused by the operation of trains, buses or other means of transportation, but is an action primarily calculated to prevent said defendant from pursuing its business as a common carrier by rail between the town of Robs- [fol. 75] town, Texas, and the City of Corpus Christi, Texas, and to deprive said defendant of the use of the properties of the Texas Mexican Railway Company between said points, and to deprive said defendant of the services of officials and employees of The Texas Mexican Railway Company at and between said points, and thus to prevent said defendant from conducting business at the town of Robstown and the city of Corpus Christi, and between said points under the terms of the said contract of November 1st, 1904, and agreements made supplemental thereto. That the suit of plaintiff further seeks to recover of defendant, The St. Louis, Brownsville and Mexico Railway Company, a sum in excess of, or at least different from, the rental provided in said contract of November 1st, 1904, and its supplements, and to impose upon this defendant liability for potential obligations which may be imposed upon The Texas Mexican Railway Company not provided for or contemplated in said contract, and further seeks to recover exemplary or punitive damages.

15

Premises considered, The St. Louis, Brownsville and Mexico Railway Company says that by reason of the matters above set forth it has not now the power further to defend the above entitled suit, and that under the law and particularly under the order of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, (being the order above described as Order No. 116-A), the commencement or continuation of this suit as against defendant, The St. Louis, Brownsville and

Mexico Railway Company, is stayed and enjoined until after final decree entered in the bankruptcy proceedings above described. Wherefore defendant, The St. Louis, Brownsville and Mexico Railway Company, respectfully prays that an order be entered by this Court that all further proceedings in this case be stayed as to The St. Louis, Brownsville and Mexico Railway Company, until final judgment is made in the bankruptcy proceedings pending in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, in that certain proceedings in bank [fol. 76] ruptcy pending before said Court styled "In the Matter of Missouri Pacific Railroad Company, Debtor," and numbered No. 6935, upon the docket of said court.

Andrews, Kelley, Kurth and Campbell, By J. J. Lockett, Jr., Jno. C. North, E. H. Crenshaw, Jr., Attorneys for Defendants, The St. Louis, Brownsville and Mexico Railway Company.

Duly sworn to by E. H. Crenshaw, Jr. Jurat omitted in printing.

[fol. 77] In District Court of Nueces County

[Title omitted]

Answer to Plea of Jurisdiction of Guy A. Thompson, Trustee for the Defendant, St. Louis, Brownsville & Mexico Ry. Co.—Filed August 16, 1943.

To the Honorable Paul A. Martineau, Special Judge of said Court:

Now comes the Plaintiff, Texas Mexican Railway Company, answering the plea to the jurisdiction over the subject matter of this suit filed by Guy A. Thompson, Trustee for the Defendant, St. Louis, Brownsville & Mexico Railway Company, and would respectfully show to the Court:

I

That the plea, while denominated a plea to the jurisdiction, is in effect a plea in abatement to dismiss and to stay the proceedings, and that it should now be entertained because it is filed outside of the due order of pleading and in

violation of Rule 84 of the Texas Rules of Civil Procedure governing the pleadings in a District Court of the State of Texas, in that it is filed as a plea in abatement after general answer has been filed and after said cause had been pending for approximately two years and after the Defendants have appeared and answered to the merits and after several orders of continuance were obtained by the Defendants.

II

That said plea and motion should be considered by this court because the Defendant urging said plea expressly reserves the right to determine this court's jurisdiction by proceedings in another court; in effect, telling this court "If you don't do as we tell you to we reserve the right to try to force you through exercise of other jurisdiction."

III

This Plaintiff says that said plea should not obtain, that it is without merit for the reason that the Plaintiff's cause of action insofar as it seeks a recovery for the use of its tracks and facilities described in Plaintiff's petition and in [fol. 78] Defendants' Motion to Stay, is within the terms and provisions of Order No. 116, in that it concerns the operation of trains expressly authorized under and by virtue of said Order.

IV

Said Motion to Stay is without merit for the reason that under the provisions of the Act of Congress, Section 66, Judicial Code, 28 U. S. C. A., Section 125, wherein it is provided: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on a business connected with such property without the previous leave of the court in which such receiver or manager was appointed by such suit, shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice". Therefore, under the provisions quoted an operating trustee under Section 77 is liable to be sued in any court of proper jurisdiction by reason of carrying on of the business of which he was appointed to administer without previous leave of the court; that the only reserva-

tion of power under the provision of that section of the Act of Congress hereinabove quoted reserved to the appointing court is in satisfaction of the rights determined in the court of proper jurisdiction.

V

Plaintiff, in further answer to the Motion, would show that the defendant, Guy A. Thompson, Trustee, and the Defendant, St. Louis, Brownsville & Mexico Railway Company, are using and occupying the property of Plaintiff in violation of a contract terminated under its terms that it shall exist for a period of Fifty years from the First day of November, 1904, unless sooner terminated by the parties hereto, and which said contract further expressly provided that the contract might be terminated without giving any [fol. 79] reasons therefor by either party upon giving twelve months' notice of such intent to terminate, which said notice has been given in accordance with the terms of said contract more than twelve months before the filing of the suit. That the continual use and operation of the railroad and other facilities by the Defendant is subject to the orders of the Interstate Commerce Commission of the United States of America, and that only the Defendant can apply for a certificate of convenience and necessity to terminate said use and operation, but that the holding over of said tracks and facilities by the Defendant of the Plaintiff's railroad in the use and operation of the railroad and other facilities fixes the Defendant's liability for the use of said railroad and facilities by the Defendant as for trespass or as a tenant at the Defendant's election and fixes in all events a liability against the Defendant for the reasonable value of the use of said railroad and facilities over which the Interstate Commerce Commission has no jurisdiction. That this action does not concern the property of the Defendant but in effect it concerns the value of the use and damage thereto of Plaintiff's property which is being usurped by the Defendant without compensation to the Plaintiff. The matter of the right to injunctive relief, if any, can only be determined upon the trial of the case, which relief the court in its discretion can deny, but the existance of such prayer for alternative relief does not or cannot deny to the Plaintiff its right to be heard on its action for damages or compensation for the use and injury of its property, or of this court's jurisdiction to try said cause.

VI

Further answering said motion, this Plaintiff says that Guy A. Thompson under his order of appointment took possession of only the property of the St. Louis, Brownsville & Mexico Railway Company, including the contract alleged. That such contract has been terminated under its own terms, [fol. 80] and, therefore, that the occupation of said railroad track and facilities of the Plaintiff is in violation of the order and under the usepation of possession by the said defendant, Guy A. Thompson.

Wherefore, for each of the reasons asserted in this answer, the Plaintiff prays the Court to deny the Plea to the Jurisdiction.

J. D. Dodson, Kleberg, Ecklrardt, Mobley & Roberts, B. D. Tarlton, Attorneys for Plaintiff, Texas Mexican Railway Company.

Duly sworn to by B. D. Tarlton. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 81] In District Court of Nueces County

[Title omitted]

Answer to Motion of Defendant St. Louis, Brownsville & Mexico Railway Co. for Stay Order—Filed August 16, 1943

To the Honorable Paul A. Martineau, Special Judge of said Court:

The Plaintiff, Texas Mexican Railway Company, answering the Motion of the Defendant, St. Louis, Brownsville & Mexico Railway Company, for an Order to Stay all Proceedings in this case would respectfully show to the Court:

I

That said Motion should not now be entertained because it is filed outside of due order of pleading and in violation of Rule 84 of the Texas Rules of Civil Procedure goverining the pleadings. That said Motion is in effect a Plea in Abatement filed after General Answer had been filed, and

after said cause had been pending for approximately two years, and after the Defendants have appeared and answered and have secured several orders of continuance.

II

This Plaintiff says that said Plea should not obtain, that it is without merit for the reason that the Plaintiff's cause of action insofar as it seeks a recovery for the use of its tracks and facilities described in Plaintiff's petition and in the Defendants' Motion to Stay, is within the terms and provisions of Order No. 116, in that it concerns the operation of trains expressly authorized under and by virtue of said Order.

III

Said Motion to Stay is without merit for the reason that under the provisions of the Act of Congress, Section 66, Judicial Code, 28 U. S. C. A., Section 125, wherein it is provided: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on a business connected with such property without the previous [fol. 82] leave of the Court in which such Receiver or Manager was appointed by such suit, shall be subject to the general equity jurisdiction of the Court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice." Therefore, under the provisions quoted a operating trustee under Section 77 is liable to be sued in any court of proper jurisdiction by reason of carrying on of the business of which he was appointed to administer without previous leave of the court; that the only reservation of power under the provision of that section of the Act of Congress hereinabove quoted reserved to the appointing court is in satisfaction of the rights determined in the court of proper jurisdiction.

IV

The plaintiff, in further answer to the Motion, would show that the Defendant, St. Louis, Brownsville & Mexico Railway Company, is using and occupying the property of Plaintiff in violation of a contract terminated under its terms that it shall exist for a period of fifty years from the first day of November, 1904, unless sooner terminated by

the parties hereto, and which said contract further expressly provided that the contract might be terminated without giving any reasons therefor by either party upon giving twelve months' notice of such intent to terminate, which said notice has been given in accordance with the terms of said contract more than twelve months before the filing of the suit. That the continual use and operation of the railroad and other facilities by the Defendant is subject to the orders of the Interstate Commerce Commission of the United States of America, and that only the Defendant can apply for a certificate of convenience and necessity to terminate said use and operation, but that the holding over of said track and facilities by the Defendant of the Plaintiff's railroad in the use and operation of the railroad and other facilities fixes the Defendant's liability for the use of said railroad and facilities by the Defendant as for trespass or as a tenant at the Defendant's election and fixes in [fol. 83] all events a liability against the Defendant for the reasonable value of the use of said railroad and facilities over which the Interstate Commerce Commission has no jurisdiction. That this action does not concern the property of the Defendant but in effect it concerns the value of the use and damage thereto of Plaintiff's property which is being usurped by the Defendant without compensation to the Plaintiff. The matter of the right to injunctive relief, if any, can only be determined upon the trial of the case, which relief the court in its discretion can deny, but the existence of such prayer for alternative relief does not or cannot deny to the Plaintiff its right to be heard on his action for damages or compensation for the use and injury of its property, or of this court's jurisdiction to try said cause.

Wherefore, for each of the reasons asserted in this answer, the Plaintiff prays the Court to deny the Motion to Stay.

J. D. Dodson, Kleberg, Eckhardt, Mobley & Roberts, B. D. Tarlton, Attorneys for Plaintiff, Texas Mexican Railway Company.

Duly sworn to by B. D. Tarlton. Jurat omitted in printing.

[fol. 84] [File endorsement omitted.]

[fol. 85] In District Court of Nueces County

[Title omitted]

Order Overruling Motion to Dismiss and/or Stay Proceedings as to Defendant St. Louis, Brownsville & Mexico Co.

On this the 26th day of August, 1943, came on to be considered the motion of defendant, St. Louis, Brownsville and Mexico Railway Company, to be dismissed from this cause and in the alternative to stay the proceedings in this cause as to it; and in connection therewith came on to be considered the answer of plaintiff to said motion.

And the Court, after hearing said motion and the argument of counsel is of opinion that the same is without merit and it is, therefore, ordered, adjudged and decreed by the court that the said motion be and the same is hereby in all things overruled, to which action of the Court the said defendant then and there in open Court excepted.

Paul A. Martineau, Special Judge Presiding.

[fol. 86] In District Court of Nueces County

[Title omitted]

Order Overruling Plea to Jurisdiction of the Defendant, Guy A. Thompson, Trustee

On this, the 26th day of August, 1943, came on to be heard the plea of defendant, Guy A. Thompson, Trustee for the St. Louis, Brownsville and Mexico Railway Company, debtor, to the jurisdiction of this court over the subject matter of this suit. In connection with such plea came on to be considered the answer of plaintiff thereto.

The Court, after having heard and considered said plea and said answer and the argument of counsel is of opinion that said plea is without merit, and it is, therefore, ordered, adjudged and decreed by the Court that said plea be and the same is hereby in all things overruled, to which action of the Court the said defendant then and there in open Court excepted.

Paul A. Martineau, Special Judge Presiding.

[fol. 87] In District Court of Nueces County

[Title omitted]

Motion of Defendant, St. Louis, Brownsville & Mexico Railroad Company for Peremptory Instruction—Filed Aug. 26, 1943

To the Honorable Judge of said Court:

Now comes defendant, St. Louis, Brownsville and Mexico Railroad Company, all evidence having been introduced and all parties having closed the taking of testimony, and moves the Court:

1. To enter at this time a judgment dismissing plaintiff's case as against this defendant; or, in the alternative,

2. To enter a judgment that plaintiff take nothing by its action as against this defendant and that this defendant go hence without day and recover its costs.

In support of its Motion, defendant, St. Louis, Brownsville and Mexico Railroad Company, respectfully shows to the Court that it appears from the undisputed evidence in the case that on or about the 1st day of July, 1933, the railway lines, trains and properties of said defendant were operated by L. W. Baldwin and Guy A. Thompson, as Trustees, under and by virtue of certain orders made and entered by the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, in a matter then and now pending before said court entitled "In the Matter of Missouri Pacific Railroad Company, Debtor," said matter being numbered Number 6935, on the Bankruptcy Docket of said Court; that on the 25th day of December, 1935, the resignation of L. W. Baldwin as Co-Trustee was accepted by the Court and Guy A. Thompson was continued in office as sole trustee, and that all properties of said defendant have since been operated by the said Guy A. Thompson as such trustee, and that particularly since November 1st, 1941, the said Guy A. Thompson as such trustee has had exclusive possession and control of the properties of the said defendant and of the operation thereof, and defendant, St. Louis, Brownsville and [fol. 88] Mexico Railroad Company, has not been guilty of

any act of commission or of omission charged against it by plaintiff.

Respectfully submitted, Andrews, Kelley, Kurth & Campbell; by J. L. Lockett, Jr., Jno. C. North, E. H. Crenshaw, Jr., Attorneys for said Defendant.

8/26/43. Overruled & Deft. excepts.

P. Martineau, Judge.

[File endorsement, omitted.]

[fol 83] In District Court of Nueces County

[Title omitted]

Motion of Defendant, Guy A. Thompson, Trustee, for Peremptory Instruction—Filed August 26, 1943

To the Honorable Judge of Said Court:

Now Comes defendant Guy A. Thompson, Trustee for the St. Louis, Brownsville and Mexico Railroad Company, Debtor, all evidence having been introduced and all parties having closed the taking of testimony, and moves the Court to give to the jury a peremptory instruction to return a verdict for defendants, for the following reasons:

1. Plaintiff is not entitled to a judgment enjoining this defendant from operating over properties of plaintiff at Robstown and Corpus Christi and between said two points under the contract of November 1, 1904, or otherwise, for the reason that under Paragraphs 18, 19 and 20, of Section 1, of the Transportation Act passed by the Congress of the United States of America and approved by the President, effective beginning February 28, 1920, and continuing in effect down to, and including, the present time; it was made unlawful and is now unlawful, for any common carrier by railroad, such as this defendant is, subject to said Transportation Act, to undertake the extension of its or his line of railroad or the construction of a new line of railroad or the acquisition and operation of any line of railroad or extension thereof, unless and until there shall have been first issued by the Interstate Commerce Commission a certificate that the present or future public convenience

and necessity require or would require the construction or operation of such additional or extended line; and, further, that no such carrier by railroad subject to said Act should abandon all or any portion of its line or the operation thereof, unless and until there should be first issued by the Interstate Commerce Commission a certificate that the present or future public convenience and necessity permit of such abandonment, and further provision was made in [fol. 90] said law for the injunction by any court of competent jurisdiction of any such unlawful construction, operation or abandonment, and for the punishment by fine or imprisonment of any carrier which, or any director, officer, receiver, operating trustee, lessee, agent or person, acting for, or employed by such carrier, who should knowingly authorize, consent to, or permit, any violation of said provisions.

This defendant avers that said law became a part of the contract of November 1, 1904, and that a necessary prerequisite to any notice of cancellation or to any cancellation of said contract by abandonment of operations over the tracks and properties therein described, was the issuance by the Interstate Commerce Commission of the certificate above described. Defendant avers that it is shown by the undisputed evidence in this case that no certificate has been issued which would permit the abandonment of his operations over plaintiff's line, and that he, therefore, cannot cease or abandon such operations without subjecting himself to prosecution and punishment for violation of the law above described.

2. Since the notice given by plaintiff to this defendant of its desire to terminate the contract of November 1st, 1904, plaintiff has continuously and consistently ratified the said contract by publishing and promulgating a time-table providing for the operation over its track between Robstown and Corpus Christi of two of defendant's passenger trains and has given to this defendant's employees in charge of each of said trains a written permission or "clearance" enabling and authorizing them as employees of this defendant to operate such trains; and has from time to time given to employees of this defendant written orders authorizing the operation over plaintiff's track of trains of this defendant not shown on said time-table.

3. There is no basis in the pleadings of plaintiff or in any evidence adduced upon the trial for the submission [fol. 91] of an issue to the jury as to reasonable value of the use to which this defendant has put plaintiff's property, there being neither pleading nor proof to show the amount of use made by this defendant of said property nor the proportion of this defendant's use of said property to the total use made thereof by this defendant, plaintiff, and other carriers or parties.

4. There is no basis in the evidence adduced upon the trial for the submission of an issue to the jury as to the reasonable value of the use to which this defendant has put plaintiff's property since November 1st, 1941. Plaintiff having prayed for actual damages at the rate of Five Hundred ($500.00) Dollars per day from and after November 1st, 1941, until use of its property by defendants is discontinued, and for punitive damages at the rate of Fifty ($50.00) Dollars per day; and there being no evidence showing or attempting to show, when, if ever, the use of plaintiff's property by this defendant will be discontinued, an essential element for the computation of any damages measured per diem is lacking.

5. It appearing from the undisputed evidence that this defendant, Guy A. Thompson, Trustee, is operating the properties of the St. Louis, Brownsville and Mexico Railway Company (including the partial use of plaintiff's properties involved in this suit) under an appointment and under orders from and issued by the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, a court of competent jurisdiction, this Court ought not to attempt to enter a judgment enjoining this defendant as prayed for by plaintiff, nor any judgment which might conflict with orders issued by or to be issued by the United States Court above named, nor any judgment affecting the property under the supervision or control of said Court.

6. It appearing from the undisputed evidence that Guy A. Thompson, trustee, is operating the properties of the St. Louis, Brownsville and Mexico Railway Company under an appointment and under orders from and issued by the Dis- [fol. 92] trict Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, a court of

competent jurisdiction, this Court ought not to render any judgment against this defendant as Trustee, especially as it is not shown that the United States Court has entered an order authorizing or permitting prosecution of this suit in this Court.

7. There is no basis for the submission of an issue as to punitive damages, plaintiff having failed to show that this defendant is not upon plaintiff's property under a right or claim of right, and it being further shown that plaintiff has continuously invited and permitted this defendant to operate its trains and cars over plaintiff's tracks; and it being clearly shown that no certificate has been issued by the Interstate Commerce Commission under which this defendant could lawfully cease or abandon said operations.

Respectfully submitted, Andrews, Kelley, Kurth & Campbell, by J. L. Lockett, Jr., Jno. C. North, E. H. Crenshaw, Jr., Attorneys for the Defendants.

8/26/43. Overruled except par. 1 & Def. except. P. Martineau, Judge.

[File endorsement omitted.]

[fol. 93] In District Court of Nueces County

[Title omitted]

Objections to the Charges of the Court—Filed August 27, 1943

To the Honorable Judge of Said Court:

Now comes the defendant, Guy A. Thompson, Trustee of the St. Louis, Brownsville and Mexico Railway Company, debtor, and before the reading of the charge of the Court to the jury makes the following separate and distinct objections to the same:

I

This defendant objects to the inclusion in Special Issue No. 1 of the words "and the claim of right of use," for the reason that this defendant is on no theory of law liable for a claim of right of use, but only for actual use of the property made by him.

II

Defendant objects to the submission of Special Issue No. 1 as a whole for the reason that there is no evidence to support any amount as the value per day of the use by defendant of the premises involved, the only evidence being as to the value of the total and exclusive use of the premises, and the evidence showing that all of the premises are and have been subjected to use by one other carrier, and a part of the premises by two other carriers, and no evidence was adduced showing the proportionate part of the total use which this defendant made of said premises.

III

This defendant objects to the submission of Special Issue No. 1 for the reason that any value of the use of said premises different from that stipulated in the contract of November 1, 1904, would be incorrect and not supported by law, as that contract is still in full force and effect, and its terms and stipulations govern the compensation to be paid by defendant to plaintiff.

[fol. 94]

IV

This Defendant objects to the submission of Special Issue No. 1 for the reason that there has been no evidence of the issuance by the Interstate Commerce Commission of a certificate which would authorize the termination of the contract of November 1, 1904, and its terms are still in force and govern the compensation to be paid by defendant to plaintiff.

V

This defendant objects to Special Issue No. 1 for the reason that the undisputed evidence shows that plaintiff has continuously ratified the contract of November 1, 1904, by inviting and permitting the operation of defendant's trains and locomotives and cars over the leased premises, and such contract is therefore still in effect, including the provisions stipulating the compensation to be paid by defendant to plaintiff.

VI

This defendant objects to Special Issue No. 1 for the reason that any answer made by the jury will be of no

assistance to the Court in rendering a judgment, and will not support any judgment, for the reason that (it not being shown when defendant will cease to use said leased premises) no final judgment can be arrived at.

Wherefore, defendant prays that each and all of the above objections be sustained.

Respectfully submitted, Andrews, Kelley, Kurth & Campbell, by J. L. Lockett, Jr., Jno. C. North, E. H. Crenshaw, Jr., Attorneys for the defendants.

1 sustained and balance overruled & def. except. 8/27/43.
P. Martineau, Judge.

[fol. 95] [File endorsement omitted.]

[fol. 96] In District Court of Nueces County

[Title omitted]

Charge of the Court and Verdict of the Jury—Filed August 27, 1943

Charge of the Court

Gentlemen of the Jury:

This case is submitted to you on special issues—that is, you are called on to answer some questions as to particular facts in the case, from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, please remember that there are standards of conduct to be lived up to, and rules to be obeyed, and that if you do not comply with them, our efforts will be wasted.

1. Do not let bias, prejudice, sympathy, resentment or any such emotion play any part in your deliberations.

2. Do not discuss the case, or even mention it to anyone whomsoever, nor permit it to be mentioned in your hearing, except in the jury room when all jurors are present for the purpose of deliberating on the verdict. If any one attempts

to mention the case to you otherwise, you must report it to the Court at once.

3. Hold yourselves apart from the lawyers, the witnesses, and the parties to the suit. They are compelled to hold themselves apart from you, and they understand your aloofness.

4. Do not speculate on matters not shown by the evidence, and about which you were not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

5. Be very careful not to consider or mention any personal knowledge or information you may have about any fact or person, which is not shown by the evidence you have [fol. 97] heard in this trial. Do not try to gather any evidence for yourselves. Your duty is to answer these questions from the evidence you have heard here, and from that alone.

6. Do not try to reach a verdict by lot, or chance, and do not return a quotient verdict, by adding together of figures, dividing by the number of jurors, and agreeing to be bound by the result. Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way.

7. Do not decide who you think should win, and then try to answer the questions accordingly. If you do that, your verdict will be worthless, and all of our time will have been wasted. Simply answer the questions as you find the facts from the evidence, without concerning yourselves about the effect of you answers.

Keep these rules in mind at all time, and obey them strictly, until you have returned your verdict. The verdict will consist of your answers to the questions, written in the blanks provided, with the certificate on the last page of this charge signed by your foreman.

By the term, "preponderance of the evidence" as used in this charge, is meant the greater weight of the credible evidence before you.

Special Issue No. 1

How much do you find, from a preponderance of the evidence, to be the reasonable value per day of the use by the

defendant, Guy A. Thompson, Trustee, of the St. Louis, Brownsville and Mexico Railway Company to the railroad tracks and facilities belonging to plaintiff situated in Corpus Christi, Texas, and from Robstown, Texas, to Corpus, Christi, Texas? Answer in Dollars and Cents per day, if any.

Answer: $278.09 per day.

In your deliberations, if you require any further instruc-[fol. 98] tions from the Court, put your request in writing and give it to the bailiff at the door of the jury room, to be handed to the Court.

After you retire to consider your verdict you will elect your own foreman. It is then his duty at once to read aloud, in the jury room, the first portion of this charge, laying down the rules which you must obey. Listen to them again, carefully, at that time. After you have retired, if any juror starts to violate any of those rules, it is the duty of the other jurors to call his attention to the matter at once and caution him. If any juror persists in such violation, or deliberately violates a rule, the other jurors should report the matter at once to the Court.

Paul A. Martineau, Special Judge Presiding.

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

A. Bagarry, Jr., Foreman of the Jury.

[File endorsement omitted.]

[fol. 99] IN DISTRICT COURT OF NUECES COUNTY

REQUEST FOR INSTRUCTIONS—Filed August 27, 1943.

Honorable Judge Martineau:

In arriving at the dollars and cents per day—Will the defendant pay one half of the taxes and their part of maintenance, or, should the figures we arrive at, be the gross total dollars and cents per day?

A. Bagarry, Jr. Foreman.

[File endorsement omitted.]

[fol. 100] In District Court of Nueces County

[Title omitted]

Additional Charge—Filed August 27, 1943

Gentlemen of the Jury:

In answer to your inquiry of the Court, you are instructed that the figure you arrive at should be the gross total dollars and cents per day.

Paul A. Martineau, Special Judge Presiding.

[fol. 101] In District Court of Nueces County

[Title omitted]

Motion of Defendants for Judgment Non Obstante Veredicto—Filed September 20, 1943

Now comes defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, and makes this his motion for judgment non obstante veredicto, and moves the Court to render judgment in his favor against plaintiff notwithstanding the answer of the jury to Special Issue No. One submitted to them by the Court; and as grounds for such motion respectfully shows to the Court:

I

That heretofore, upon the trial of this case, the Court submitted the case to the jury upon a special issue and that the jury returned its findings which were its special verdict in response to said issue, which said issue and the jury's findings in answer thereto were received by the Court and were filed and entered upon the minutes of the Court, the issue submitted to the jury and the finding thereon being as follows:

"Special Issue No. 1

"How much do you find, from a preponderance of the evidence, to be the reasonable value per day of the use by the defendant, Guy A. Thompson, Trustee, of the St. Louis, Brownsville and Mexico Railway Company to the railroad tracks and facilities belonging to plaintiff situated in Corpus

Christi, Texas, and from Robstown, Texas, to Corpus Christi, Texas?

"Answer in Dollars and Cents per day, if any.

"Answer: $278.09 per day."

2

That this Court erred in submitting said Special Issue, or any special issue, to the jury in this case for the following reason, towit: The Court erred in overruling and in fail- [fol. 102] ing to sustain this defendant's plea to the jurisdiction, or in the alternative, his motion to stay proceedings in this cause unless and until a final judgment should be entered by the District Court of the United States for the Eastern Division, Eastern Judicial District of the State of Missouri, in a certain matter then and now pending in the said court styled "In the Matter of Missouri Pacific Railroad Company, et al., Debtors", numbered No. 6935 on the bankruptcy docket of said Court, or unless and until said District Court of the United States should enter an order authorizing the prosecution of this suit in this court.

3

The Court erred in submitting said Special Issue No. One or any other special issue to the jury, for the reason that it appeared from all evidence in this case that defendant occupied the premises of plaintiff by virtue of a contract of November 1, 1904; and that at the time this suit was filed and at the time this suit was tried, no certificate had been issued by the Interstate Commerce Commission of the United States that the present and future public convenience and necessity permitted the abandonment by defendant of his operations over plaintiff's line, as required by Paragraphs 18, 19 and 20 of Section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920; and until the issuance of such certificate said contract of November 1, 1904, remained in full force and effect, including the stipulation of compensation to be paid by defendant to plaintiff, notwithstanding plaintiff's notice to defendant of its desire to terminate said contract; and defendant having tendered to plaintiff prior to the filing of this suit and upon the trial of this suit full payment in accordance with said contract, no judgment other than for the

sum due under said contract should have been rendered by the Court.

4

The Court erred in submitting to the jury said Special Issue No. One or any other special issue for the reason that there was no evidence to support any amount as the value [fol. 103] per day of the use made by defendant of the premises involved, the only evidence introduced being as to the value of the total and exclusive use of the premises, and the evidence showing that all of the premises are and have been subjected to use by plaintiff, and a part of the premises by both plaintiff and the Texas and New Orleans Railroad Company, and no evidence being adduced showing the proportionate part of the total use which this defendant made of said premises.

5.

The Court erred in submitting said Special Issue No. One to the jury for the reason that there is no basis in the pleadings of plaintiff or in any evidence adduced upon the trial for the submission of an issue to the jury as to reasonable value of the use to which the defendant put plaintiff's property; there being neither pleading nor proof to show the amount of use made by defendant of plaintiff's property nor the proportion of the defendant's use of said property to the total use made thereof by defendant, plaintiff, and other carriers or parties.

6

The Court erred in submitting said issue or any special issue to the jury for the reason that it appeared from the undisputed evidence in said case that plaintiff, after giving notice of its desire to terminate said contract, continuously and consistently ratified said contract from the date of said notice to the date of trial, by listing upon its official timetables the trains of this defendant, and giving on each day during said period what are known as "clearances or permits to this defendant's employees to operate said trains, and by issuing and delivering to this defendant's employees special orders for operation of other trains not scheduled upon its timecard."

7

The Court erred in submitting any issue to the jury and in denying defendant's motion for a peremptory instruc-

tion for the reason that, there is no basis in the evidence ad- [fol. 104] duced upon the trial for the submission of an issue to the jury as to the reasonable value of the use to which this defendant has put plaintiff's property since November 1st, 1941. Plaintiff having prayed for actual damages at the rate of Five Hundred ($500.00) Dollars per day from, and after, November 1st, 1941, until use of its property by defendants is discontinued, and for punitive damages at the rate of Fifty ($50.00) Dollars per day; and there being no evidence showing or attempting to show, when, if ever, the use of plaintiff's property by this defendant will be discontinued, an essential element for the computation of any damages measured per diem is lacking.

8

The Court erred in submitting to the jury said Special Issue No. One or any other special issue in this case for the reason that the answer of the jury is not and cannot be of assistance to the Court in rendering final judgment and will not support a final judgment, for the reason that (it not being shown when this defendant will cease to use said leased premises), no final judgment can be determined from the answer of the jury to said issue.

9

The Court erred in submitting any issue to the jury and in denying defendant's motion for peremptory instruction for the reason that, it appearing from the undisputed evidence that this defendant, Guy A. Thompson, Trustee, is operating the properties of the St. Louis, Brownsville and Mexico Railway Company (including the partial use of plaintiff's properties involved in this suit) under an appointment and under orders from and issued by the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, a court of competent jurisdiction, this Court ought not to attempt to enter a judgment enjoining this defendant as prayed for by plaintiff, nor any judgment which might conflict with orders issued by or to be issued by the United States Court above named, nor any judgment affecting the property under the supervision or control of said Court.

[fol. 105] 10

The Court erred in submitting any issue to the jury and in denying defendant's motion for a peremptory instruction for the reason that, it appearing from the undisputed evidence that Guy A. Thompson, Trustee, is operating the properties of The St. Louis, Brownsville and Mexico Railway Company under an appointment and under orders from and issued by the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, a court of competent jurisdiction, this Court ought not to render any judgment against this defendant as Trustee, especially as it is not shown that the United States Court has entered an order authorizing or permitting prosecution of this suit in this Court.

Premises considered, this defendants prays that the Court enter judgment (a) that the plaintiff's prayer that defendants, The St. Louis, Brownsville and Mexico Railway Company and Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, be enjoined from further use of plaintiff's tracks and properties be in all things denied; (b) that defendant, The St. Louis, Brownsville and Mexico Railway Company, be dismissed with its costs; and (c) that plaintiff take nothing by its prayer for actual and exemplary damages as against defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, but that as to such demand said defendant go hence without day and recover all costs in this behalf expended, without prejudice, however, to the right of plaintiff to demand, receive, sue for and collect any and all sums due to it from defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, under and by virtue of the terms of the contract of November 1, 1904, with its amendments and supplements, after presentation to said Trustee of proper bills showing the amounts due.

Respectfully submitted, Andrews, Kelley, Kurth and Campbell. By J. L. Lockett, Jr. Jno. C. North. [fol. 106] E. H. Crenshaw, Jr., Attorneys for Defendants.

[File endorsement omitted.]

[fol. 107] IN DISTRICT COURT OF NUECES COUNTY

[Title omitted]

JUDGMENT OVERRULING MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO

On this the 20 day of September, 1943, came on to be heard the motion of Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, that judgment non obstante veredicto be rendered in his favor.

After hearing said motion and the argument of counsel and giving full consideration to the same, it is ordered and decreed by the Court that said motion be in all things overruled, to which action of the Court said defendant by his counsel then and there in open court duly excepts.

Paul A. Martineau, Sp. Judge, 94th Dist. Ct.

[fol. 108] IN DISTRICT COURT OF NUECES COUNTY

[Title omitted]

MOTION FOR JUDGMENT IN BEHALF OF PLAINTIFF—Filed Sept. 20, 1943

To the Honorable Judge of Said Court:

Now comes The Texas Mexican Railway Company, plaintiff in the above entitled and numbered cause, and moves the Court to enter judgment in its favor based upon the verdict of the jury returned in this cause. Order of Judgment is herewith tendered as part of this motion.

Respectfully submitted, J. S. Dodson, E. H. Borchers, Kleberg, Eckhardt, Mobley & Roberts, Tarlton & Koch, Attorneys for the Plaintiff.

[File endorsement omitted.]

[fol. 109] IN THE 94TH DISTRICT COURT OF NUECES COUNTY, TEXAS—AUGUST TERM, A. D. 1943

No. 24588-C

THE TEXAS-MEXICAN RAILWAY COMPANY

vs.

ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, ET AL.

JUDGMENT

On August 16, 1943 the above styled and numbered cause having been duly set for trial, the same was by the Court called, whereupon Plaintiff, The Texas Mexican Railway Company, through its attorneys, and Defendant, St. Louis, Brownsville & Mexico Railway Company, through its attorneys, and Defendant, Guy A. Thompson, Trustee of St. Louis, Brownsville & Mexico Railway Company, through his attorneys, severally appeared and announced ready for trial. Thereupon a jury of twelve good and lawful men was duly tried, impaneled and sworn, consisting of A. Bagarry and eleven others, and said cause proceeded to trial before said jury.

The pleadings of the parties having been read and testimony admitted by the Court having been adduced before the jury and all parties having rested, the Court being of opinion and so finds from the evidence:

1st: That the contract dated Nov. 1, 1904 by and between The Texas Mexican Railway Company, Plaintiff herein, and St. Louis, Brownsville & Mexico Railway Company, Defendant herein, and the supplement thereto dated Oct. 1, 1914, by and between The Texas Mexican Railway Company, Plaintiff herein, and Frank Andrews, Receiver of St. Louis, Brownsville & Mexico Railway Company, and St. Louis, Brownsville & Mexico Railway Company, Defendant herein, described in the First Amended Original Petition of Plaintiff, were in all things, adopted by Defendant, Guy A. Thompson, Trustee for said St. Louis, Brownsville & Mexico Railway Company.

2nd: That Plaintiff and said Defendant, Guy A. Thompson, Trustee for St. Louis, Brownsville & Mexico Railway

Company, operated under said contract and supplement from the date of the appointment of said Trustee until Oct. 31, 1941.

[fol. 110] 3rd: That Plaintiff, The Texas Mexican Railway Company, gave due notice of termination of said contract and supplement, as provided in said contract, to become effective Oct. 31, 1941.

4th: That from and after Nov. 1, 1941, Defendant, St. Louis, Brownsville & Mexico Railway Company, has not been using the property of Plaintiff, The Texas Mexican Railway Company, described in said contract and supplement, but Defendant, Guy A. Thompson, Trustee for St. Louis, Brownsville & Mexico Railway Company, has been making use of said property and claiming the right to do so under said contract over the protest of Plaintiff.

The Court having prepared and submitted to the respective attorneys the proposed charge and no further issues having been requested by any party, said proposed charge was submitted to the jury in words and figures substantially as follows, towit:

"GENTLEMEN OF THE JURY:

This case is submitted to you on special issues—that is, you are called on to answer some questions as to particular facts in the case, from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, please remember that there are standards of conduct to be lived up to, and rules to be obeyed, and that if you do not comply with them, our efforts will be wasted.

1. Do not let bias, prejudice, sympathy, resentment or any such emotion play any part in your deliberations.

2. Do not discuss the case, or even mention it, to anyone whomsoever, nor permit it to be mentioned in your hearing, except in the jury room when all jurors are present for the purpose of deliberating on the verdict. If anyone attempts to mention the case to you other-

[fol. 111] wise, you must report it to the Court at once.

3. Hold yourselves apart from the lawyers, the witnesses, and the parties to the suit. They are compelled to hold themselves apart from you, and they understand your aloofness.

4. Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

5. Be very careful not to consider or mention any personal knowledge or information you may have about any fact or person, which is not shown by the evidence you have heard in this trial. Do not try to gather any evidence for yourselves. Your duty is to answer these questions from the evidence you have heard here, and from that alone.

6. Do not try to reach a verdict by lot, or chance, and do not return a quotient verdict, by adding together of figures, dividing by the number of jurors, and agreeing to be bound by the result. Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way.

7. Do not decide who you think should win, and then try to answer the questions accordingly. If you do that, your verdict will be worthless, and all of your time will have been wasted. Simply answer the questions as you find the facts from the evidence, without concerning yourselves about the effect of your answers.

Keep these rules in mind at all times, and obey them [fol. 112] strictly, until you have returned your verdict. The verdict will consist of your answers to the questions, written in the blanks provided, with the certificate on the last page of this charge signed by your foreman.

By the term 'preponderance of the evidence', as used in this charge, is meant the greater weight of the creditable evidence before you.

Special Issue No. 1

How much do you find, from a preponderance of the evidence, to be the reasonable value per day of the use by the defendant, Guy A. Thompson, Trustee, of the St. Louis, Brownsville and Mexican Railway Company of the railroad tracks and facilities belonging to plaintiff situated in Corpus Christi, Texas, and from Robstown, Texas, to Corpus Christi, Texas?

Answer in Dollars and Cents per day, if any.

Answer: —— per day.

In your deliberations, if you require any further instructions from the Court, put your request in writing and give it to the bailiff at the door of the jury room, to be handed to the Court.

After you retire to consider your verdict you will elect your own foreman. It is then his duty at once to read aloud, in the jury room, the first portion of this charge, laying down the rule which you must obey. Listen to them again, carefully, at that time. After you have retired, if any juror starts to violate any of those rules, it is the duty of the other jurors to call his attention to the matter at once and caution him. If any juror persists in such violation, or deliberately violates a rule, the other jurors should report the matter at once to the Court.

(Signed) Paul A. Martineau, Special Judge Presiding.

[fol. 113] We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

Foreman of the Jury."

Said charge having been read to the jury and all parties having concluded their arguments before the jury, said jury retired to consider their verdict, and thereafter, through the officer in charge, duly caused to be presented to the Court, in open Court, a question in writing, reading in words and figures substantially as follows, towit:

"Honorable Judge Martineau:

In arriving at the dollars and cents per day—will the defendant pay one half the taxes and their part of main-

tenance, or, should the figures we arrive at, be the gross total dollars and cents per day.

(Signed) A. Bagarry, Foreman.

Filed Aug. 27, 1943. Ben A. Ligon, Clerk District Court Nueces County, Texas. By Louise Eubank, Deputy."

Said written request having been received by the Court, attorneys for all parties were called before the Court and were advised in open Court by the Court of said inquiry, and thereafter, with consent of attorneys for all parties, the Court prepared, in writing, an answer to said request and read the same to the jury in open Court, in the presence of attorneys for all parties, reading substantially as follows, towit:

"GENTLEMEN OF THE JURY:

In answer to your inquiry of the Court, you are instructed that the figure you arrive at should be the gross total dollars and cents per day.

(Signed) Paul A. Martineau, Special Judge, Presiding.

[fol. 114] Filed Aug. 27, 1943. Ben A. Ligon, Clerk District Court, Nueces County, Texas By Louise Eubank, Deputy."

Thereupon said jury retired to further consider of their verdict and thereafter returned into open Court as their verdict the figure $278.09 in the blank line prepared in the answer under Special Issue No. 1 and signed "A. Bagarry" over the space provided for the foreman to sign in the form of verdict contained at the conclusion of the charge.

Said verdict so signed and returned into open Court was by the Court received from the foreman of the jury, and the jury having announced in open Court the same to be their verdict, the same was by the Court received and ordered filed as the verdict of the jury in this cause.

Whereupon the Court being of opinion that judgment should be entered in accordance with said findings by the Court and upon said verdict.

It is on this the 20th day of September, A. D. 1943, by the Court Considered, Ordered and Adjudged that the Texas Mexican Railway Company shou[illegible]ve, and it is

hereby awarded its judgment, jointly and severally against St. Louis, Brownsville & Mexico Railway Company and Defendant, Guy A. Thompson, Trustee for St. Louis, Brownsville & Mexico Railway Company; that the contract dated Nov. 1, 1904 by and between The Texas Mexican Railway Company, Plaintiff herein, and St. Louis, Brownsville & Mexico Railway Company, Defendant herein, and the supplement thereto dated Oct. 1, 1914, by and between The Texas Mexican Railway Company, Plaintiff herein, and Frank Andrews, Receiver of St. Louis, Brownsville & Mexico Railway Company, and St. Louis, Brownsville & Mexico Railway Company, Defendant herein, were terminated as of Oct. 31, 1941.

It is by the Court further Considered, Ordered and Adjudged that Plaintiff, The Texas Mexican Railway Company, should have, and it is hereby awarded judgment against Guy A. Thompson, Trustee for St. Louis, Brownsville & Mexico Railway Company, for One Hundred Eighty-[fol. 115] Four Thousand Nine Hundred Twenty-Nine Dollars and Eighty-five cents ($184,929.85), as the value of the use of Plaintiff's property from Nov. 1, 1941 to Aug. 27, 1943 inclusive, together with interest on said sum from Aug. 28, 1943 until paid, at the rate of 6% per annum.

It is by the Court further Considered, Ordered and Adjudged that Plaintiff should have, and it is hereby awarded judgment, jointly and severally, against Defendants, St. Louis, Brownsville & Mexico Railway Company, and Guy A. Thompson, Trustee for St. Louis, Brownsville & Mexico Railway Company, for all costs in this behalf incurred.

It appearing to the Court that Defendant, Guy A. Thompson, Trustee, is acting under due appointment by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, in the matter of Missouri Pacific Railroad Company, No. 6935 on the docket of said Court, a reorganization proceeding under the Bankruptcy Act, and that all property in his possession as said Trustee is under the jurisdiction of said Court, no execution on this judgment as against said Defendant-Trustee shall issue, but the Clerk of this Court is hereby ordered to prepare and deliver to Plaintiff as part of the costs of this proceeding a certified copy of this judgment, authenticated in the manner prescribed by the Statutes of the United States to import verity to this judgment, that Plaintiff,

The Texas Mexican Railway Company, may file the same as a claim against said defendant Trustee.

It is by the Court further Considered, Ordered and Adjudged that execution hereon for all costs of this proceeding may issue against Defendant, St. Louis, Brownsville & Mexico Railway Company.

It is by the Court further Considered, Ordered and Adjudged that all relief prayed for by the respective parties and not by this judgment specifically awarded should be, and the same is hereby, denied.

[fol. 116] Paul A. Martineau, Special Judge Presiding, 94th District Court, Nueces County, Texas.

Approved as to form: ——— ———:

———

[fol. 117] In District Court of Nueces County

[Title omitted]

Motion of Defendant, Guy A. Thompson, Trustee, for New Trial—Filed September 22, 1943

Now comes defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, and filed this, his motion for new trial and moves the Court to set aside the judgment rendered against this defendant on the 20th day of September, 1943, for the reasons (in addition to the reasons set forth in the motion for judgment non obstante veredicto) as follows:

1. The Court erred in its third finding to the effect that plaintiff, The Texas Mexican Railway Company, gave due notice of terminaton of "said contract and supplement" as provided in said contract, to become effective October 31, 1941; for the reason that it being made to appear from the undisputed evidence that at the time said notice was given by plaintiff no certificate had been issued by the Interstate Commerce Commission of the United States that the present and future public convenience and necessity permitted the abandonment by defendant of his operations over plaintiff's line, as required by Paragraphs 18, 19 and 20 of Section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920, this defendant could not lawfully abandon such operations, and unless and until such

certificate was issued the notice given by plaintiff to this defendant was of no legal force or effect.

2. The Court erred in awarding judgment in favor of The Texas Mexican Railway Company against defendants, The St. Louis, Brownsville and Mexico Railway Company and Guy A. Thompson, Trustee for said Company, that the contract dated November 1, 1904, by and between The Texas Mexican Railway Company and The St. Louis, Brownsville and Mexico Railway Company, and supplement thereto dated October 1, 1914, were terminated as of October 31, 1941, for the reason that it being made to appear from the undisputed evidence that at the time said notice was given by plaintiff no certificate had been issued by the [fol. 118] Interstate Commerce Commission of the United States that the present and future public convenience and necessity permitted the abandonment by defendant of his operations over plaintiff's line, as required by Paragraphs 18, 19 and 20 of Section I of the Interstate Commerce Act as amended by the Transportation Act of 1920, this defendant could not lawfully abandon such operations, and unless and until such certificate was issued the notice given by plaintiff to this defendant was of no legal force or effect; and said contract and its supplement were, therefore, never legally terminated.

3

The Court erred in rendering judgment for $184,929.85 for the reason that judgment for said amount is not supported by any pleading in the case, plaintiff having prayed for damages at the rate of $500.00 per day from November 1, 1941, until such time as defendant should vacate its property, and it not being shown when defendant would vacate the property of plaintiff.

4

The Court erred in permitting to be read to the jury, over the timely objection of this defendant, the application made by plaintiff to the Interstate Commerce Commission for authority to cancel a trackage agreement, and the letter of the Secretary of the Interstate Commerce Commission, addressed to plaintiff, and advising plaintiff that the Interstate Commerce Commission did not exercise jurisdiction over such an application; for the reason that

said application and letter were not material to any issue in the case and were calculated to be prejudicial to this defendant, and constituted a transaction between plaintiff and the Interstate Commerce Commission to which this defendant was not a party and by which this defendant was not bound.

5

The Court erred in permitting plaintiff's witness, Joe Roscoe, to testify, over timely objection of this defendant, as to the cash market value of certain real property which [fol. 119] was used by it exclusively as a right-of-way on which to maintain its tracks and operate trains; for the reason that it clearly appeared that such right-of-way was not susceptible of general and unrestricted use but was dedicated solely to use as a railroad right-of-way, and on that account could not be readily bought or sold on the market, and that the witness, however experienced in the purchase and sale of ordinary realty, had had no experience whatever in the purchase and sale of railroad right-of-way, and was therefore not qualified to express an opinion as to its value.

6

The Court erred in permitting the plaintiff to prove by the witness, John W. Mussett, Jr., over the timely objection of this defendant, that the cost of maintenance of plaintiff's right-of-way from November 1, 1941, to February 28, 1942, was $61,481.27, and the taxes $15,174.93, and the cost of maintenance for the four months following February 28, 1942, was $17,636.96; for the reason that it appeared that the witness was not qualified by experience or by his position with plaintiff company to give testimony that such expenditures were actually made or that they were reasonable and necessary.

7

The Court erred in permitting the witness, Terrell L. Barflett to testify, over the timely objection of this defendant, what would be the reasonable rental value or earning capacity of plaintiff's property; for the reason that it appeared that said witness (although he might have had slight experience in supervising the construction of small portions of railroad) had had no experience whatever in determining what was the usual and customary revenue earned by

the operation of railroads, and was not qualified as an expert to express an opinion as to the reasonable earning capacity of plaintiff's road.

8

The Court erred in admitting in evidence, over the timely objection of this defendant, the mimeographed report of [fol. 129] the witness, Terrell L. Bartlett, giving his opinion as to values of various component parts of plaintiff's property; for the reason that a very substantial part of said report was not original testimony, within the knowledge of the witness, but consisted of information obtained by the witness from hearsay declarations of plaintiff's officers and employees who did not testify in court, and from documents in the offices of plaintiff which the witness stated he had examined and which were not testified to by any qualified witness, nor in any other manner authenticated in court.

9

The Court erred in permitting plaintiffs, over the timely objection of this defendant, to introduce a report (designated by the Court Reporter as Plaintiff Exhibit No. 44) and to identify it by the witness G. D. Winch as a correct statement of the working capital of plaintiff; for the reason that it clearly appeared from the testimony of said witness Winch that a substantial part of the sum designated in said report as working capital was money which plaintiff had not received and did not have on hand, and another substantial portion thereof consisted of money dedicated to the payment of certain obligations of plaintiff and was not available as working capital for the operation of the railroad.

10

The Court erred in permitting plaintiff, over the timely objection of this defendant, to identify by the witness, John W. Mussett, Jr., and introduce in evidence a loose leaf book (designated by the Court Reporter as Plaintiff Exhibit No. 59) as a permanent record of plaintiff showing changes and improvements made in different portions of plaintiff's track; for the reason that the book offered consisted of the conventional type of book with rings which could be opened and of loose leaves which could be taken

out and changed or substituted, and that the writing on said leaves was made in pencil and therefore easily subject to erasure and change, and that the testimony of the [fol. 121] witness Mussett in identifying said book was that it was not made by him in person nor under his supervision and not a part of the records of plaintiff company committed to the custody of said witness, but was made by M. M. Linedecker, Jr., who did not appear and testify in court as to the correctness of the entries made in said book.

Wherefore, this defendant prays that the Court enter an order setting aside the judgment pronounced in this cause on the 20th day of September, 1943, and granting a new trial of this cause.

Andrews, Kelley, Kurth & Campbell, by J. L. Lockett, Jr., Jno. C. North, E. H. Crenshaw, Jr., Attorneys for the Defendant, Guy A. Thompson, Trustee.

[File endorsement omitted.]

[fol. 122] In District Court of Nueces County

[Title omitted]

Judgment Overruling Motion of Trustee for New Trial

On this the 22 day of September, 1943, came on to be heard the motion for new trial filed and presented herein by the defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor.

After hearing said motion and the argument of counsel and after full consideration thereof, it is ordered, adjudged and decreed by the Court that the said action be in all things overruled, to which action of the Court said defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, by and through his counsel, then and there in open court duly excepts and gives notice of appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio.

Paul A. Martineau, Special Judge, 94th District Court.

O. K. as to form: B. D. Tarlton.

[fol. 123] In District Court of Nueces County

[Title omitted]

Motion of Defendant, The St. Louis, Brownsville & Mexico Railway Company, for New Trial.—Filed September 22, 1943.

Now comes defendant, The St. Louis, Brownsville and Mexico Railway Company, and files this, its motion for new trial and moves the Court to set aside the judgment rendered against this defendant on the 20th day of September, 1943, for the reasons (in addition to the reasons set forth in the motion for judgment non obstante verdicto) as follows:

1

As to this defendant the Court erred in its third finding to the effect that plaintiff, The Texas Mexican Railway Company, gave due notice of termination of "said contract and supplement", for the reason that there is no evidence in the record from any source of notice to The St. Louis, Brownsville and Mexico Railway Company or any officer or agent thereof authorized to receive such notice on its behalf.

2

The Court erred in awarding judgment in favor of The Texas Mexican Railway Company against defendants, The St. Louis, Brownsville and Mexico Railway Company and Guy N. Thompson, Trustee for said Company, that the contract dated November 1, 1904, by and between the Texas Mexican Railway Company and The St. Louis, Brownsville and Mexico Railway Company, and supplement thereto dated October 1, 1914, were terminated as of October 31, 1941, for the reason that it being made to appear from the undisputed evidence that at the time said notice was given by plaintiff no certificate had been issued by the Interstate Commerce Commission of the United States that the present and future public convenience and necessity permitted the abondonment by defendant of its operations over plain-

[fol. 124] tiff's line, as required by Paragraphs 18, 19 and 20 of Section 1 of the Interstate Commerce Act as amended by The Transportation Act of 1920, this defendant could not lawfully abondon such operations and unless and until such certificate was issued the notice given by plaintiff to

this defendant was of no legal force or effect; and said contract and its supplement were, therefore, never legally terminated.

3

The Court erred in rendering judgment to the effect that the contract of November 1, 1904, and its supplement were terminated as of October 31, 1941, insofar as The St. Louis, Brownsville and Mexico Railway Company is concerned for the reason that, it appearing that the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, has taken full and complete charge of all properties, rights and assets of The St. Louis, Brownsville and Mexico Railway Company, this Court has not jurisdiction to deprive said The St. Louis, Brownsville and Mexico Railway Company of any property rights it may have under said contract by Judicial decree.

4

The Court erred in awarding plaintiff judgment for costs as against defendant, The St. Louis, Brownsville and Mexico Railway Company, for the reason that it appeared from all the evidence that said defendant, The St. Louis, Brownsville and Mexico Railway Company, has not at any time since October 31, 1941, used or occupied the premises of plaintiff nor made any attempt to use or occupy said premises, and, is therefore, not liable to plaintiff in any sum or upon any account and should not, therefore, be cast in the costs.

5

The Court erred in ordering that execution for all costs of this proceeding issue against defendant, The St. Louis, Brownsville and Mexico Railway Company, being now in the custody of the District Court of the United States for [fol. 125] the Eastern Division, Eastern Judicial District of Missouri, in a bankruptcy proceeding pending in said court, its properties are not subject to execution issuing out of this or any other state court.

6

The Court erred in permitting to be read to the jury, over the timely objection of this defendant, the application made by plaintiff to the Interstate Commerce Com-

mission for authority to cancel a trackage agreement, and the letter of the Secretary of the Interstate Commerce Commission, addressed to plaintiff, and advising plaintiff that the Interstate Commerce Commission did not exercise jurisdiction over such an application; for the reason that said application and letter were not material to any issue in the case and were calculated to be prejudicial to this defendant, and constituted a transaction between plaintiff and the Interstate Commerce Commission to which this defendant was not a party and by which this defendant was not bound.

7

The Court erred in permitting plaintiff's witness, Joe Roscoe, to testify, over timely objection of this defendant, as to the cash market value of certain real property which was used by it exclusively as a right-of-way to maintain its tracks and operate trains; for the reason that it clearly appeared that such right-of-way was not susceptible of general and unrestricted use but was dedicated solely to use as a railroad right-of-way and on that account could not be readily bought or sold on the market, and that the witness, however experienced in the purchase and sale of ordinary realty, had had no experience whatever in the purchase and sale of railroad right-of-way, and was therefore not qualified to express an opinion as to its value.

[fol. 126]

8

The Court erred in permitting the plaintiff to prove by the witness, John W. Mussett, Jr., over the timely objection of this defendant, that the cost of maintenance of plaintiff's right-of-way from November 1, 1941 to February 28, 1942, was $61,481.27, and the taxes $15,174.93, and the cost of maintenance for the four months following February 28, 1942, was $17,636.86; for the reason that it appeared that the witness was not qualified by experience or by his position with plaintiff company to give testimony that such expenditures were acually made or that they were reasonable and necessary.

9

The Court erred in permitting the witness, Terrell L. Bartlett to testify, over the timely objection of this defendant, what would be the reasonable rental value or earning capacity of plaintiff's property; for the reason that it ap-

peared that said witness (although he might have had slight experience in supervising the construction of small portions of railroad) had had no experience whatever in determining what was the usual and customary revenue earned by the operation of railroads, and was not qualified as an expert to express an opinion as to the reasonable earning capacity of plaintiff's road.

10

The Court erred in admitting in evidence, over the timely objection of this defendant, the mimeographed report of the witness, Terrell L. Bartlett, giving his opinion as to values of various component parts of plaintiff's property; for the reason that a very substantial part of said report was not original testimony, within the knowledge of the witness, but consisted of information obtained by the witness from hearsay declarations of plaintiff's officers and employees who did not testify in court, and from documents in the offices of plaintiff which the witness stated he had examined [fol. 127] and which were not testified to by any qualified witness, nor in any other manner authenticated in court.

11

The Court erred in permitting plaintiff, over the timely objection of this defendant, to introduce a report (designated by the Court Reporter as Plaintiff Exhibit No. 44) and to identify it by the witness G. D. Winch as a correct statement of the working capital of plaintiff; for the reason that it clearly appeared from the testimony of said witness Winch that a substantial part of the sum designated in said report as working capital was money which plaintiff had not received and did not have on hand, and another substantial portion thereof consisted of money dedicated to the payment of certain obligations of plaintiff and was not available as working capital for the operation of the railroad.

12

The Court erred in permitting plaintiff, over the timely objection of this defendant, to identify by the witness, John W. Mussett, Jr., and introduce in evidence a loose leaf book (designated by the Court Reporter as Plaintiff Exhibit No. 59) as a permanent record of plaintiff showing changes and improvements made in different portions of plaintiff's

track; for the reason that the book offered consisted of the conventional type of book with rings which could be opened and of loose leaves which could be taken out and changed or substituted, and that the writing on said leaves was made in pencil and therefore easily subject to erasure and change, and that the testimony of the witness Mussett in identifying said book was that it was not made by him in person nor under his supervision and not a part of the records of plaintiff company committed to the custody of said witness, but was made by M. M. Linedecker, Jr., who did not appear and testify in court as to the correctness of the entries made in [fol. 128] said book.

Wherefore, this defendant prays that the Court enter an order setting aside the judgment pronounced in this cause on the 20th day of September, 1943, and granting a new trial of this cause.

Andrews, Kelley, Kurth & Campbell. By J. J. Lockett, Jr., Jno. C. North, E. H. Crenshaw, Jr., Attorneys for the Defendant; St. Louis, Brownsville & Mexico Railway Company.

[File endorsement omitted.]

[fol. 129] In District Court of Nueces County

[Title omitted]

Judgment Overruling Motion of the St. Louis, Brownsville and Mexico Railway Company, Defendant, for New Trial

On this the 22 day of September, 1943, came on to be heard the motion for new trial filed and presented herein by the defendant, The St. Louis, Brownsville and Mexico Railway Company.

After hearing said motion and the argument of counsel, and after full consideration thereof it is ordered, adjudged and decreed by the Court that the said motion be in all things overruled, to which action of the Court said defendant, The St. Louis, Brownsville and Mexico Railway Company, by and through its counsel, then and there in open court duly excepts and gives notice of appeal to the Court.

of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio.

Paul A. Martineau, Special Judge, 94th District Court.

O. K. as to form: B. D. T.

[fols. 130-134] Bond on appeal for $1,000.00 approved and filed Sept. 30, 1943, omitted in printing.

[fol. 135] In District Court of Nueces County

Request for Transcript—Filed Sept. 25, 1943

Kingsville, Texas, September 24th, 1943.

Mr. Ben A. Ligon, Clerk District Court, Corpus Christi, Texas

Dear Mr. Ligon:

In the above case please prepare for defendants, The St. Louis, Brownsville and Mexico Railway Company and Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, a transcript of proceedings containing copies of the following documents in the order listed:

1. Caption.
2. Plaintiff's First Amended Original Petition, filed April 9th, 1943.
3. Original Answer of Defendants filed June 29, 1942.
4. Defendants' demand for Admission of Facts, filed June 20, 1942.
5. Plaintiff's Response to said Demand, filed July 7, 1942.
6. Plaintiff's Demand for Admission of Facts, filed July 8, 1942.
7. Response of Defendants to said Demand, filed October 1, 1942.
8. Plea of Guy A. Thompson, Trustee, to Jurisdiction, filed July 30, 1943.
9. Plaintiff's Answer to said Plea, filed August 16, 1943.
10. Motion of StLB&M to stay Proceedings, filed July 30, 1943.
11. Answer of Plaintiff to said Motion, filed August 16, 1943.

[fol. 136] 12. Order of Court on Plea of Thompson, Trustee to Jurisdiction, made August 26, 1943.

13. Order of Court on Motion of StLB&M to Stay Proceedings, made August 26, 1943.

14. Motions of Defendants for Peremptory Instruction.

15. Charge of the Court.

16. Objection of Defendants to Charge, filed August 27, 1943.

17. Motion for Judgment non obstante verdicto, filed September 20, 1943.

18. Order overruling said Motion, made September 20, 1943.

19. Plaintiff's Motion for Judgment, filed September 20, 1943.

20. Judgement, made September 20, 1943.

21. Motion of Thompson, Trustee, for New Trial, filed September 22, 1943.

22. Order of Court overruling said Motion, made September 22, 1943.

23. Motion of STLB&M for New Trial, filed September 22, 1943.

24. Order overruling said Motion, made September 22, 1943.

25. Cost Bill.

26. Appeal Bond.

27. Certificate.

Your fee for preparing transcript and Mr. Alexander's fee for preparing statement of facts will both be paid promptly on presentation.

I will send you bond within a few days.

Yours very truly, E. H. Crenshaw, Jr.

ehc/mt

[File endorsement omitted.]

[fols. 137-138] Bill of costs omitted in printing

[fols. 139-144] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 145] In District Court of Nueces County

No. 24,588-C

The Texas Mexican Railway Company

vs.

St. Louis, Brownsville & Mexico Railway Company, et al.

Transcript of Hearing

Present: Hon. Paul A. Martineau, Special Judge Presiding. Mr. J. D. Dodson, Smith Young Tower, San Antonio, Texas; Mr. Elmore H. Borchers, Laredo, Texas; Mr. B. Dudley Tarlton, Nixon Building, Corpus Christi, Texas; and, Mr. Marcellus G. Eckhardt, Jones Building, Corpus Christi, Texas, for the Plaintiff. Messrs. Andrews, Kelley, Kurth & Campbell, Houston, Texas, by Mr. Lockett; Mr. E. Crenshaw, Jr., Kingsville, Texas; and, Mr. John C. North, Medical Professional Building, Corpus Christi, Texas, for the Defendants.

Be It Remembered That on this, the 16th day of August, A. D., 1943, the same being a regular day of the August Term, A. D., 1943, of the Ninety-Fourth District of Nueces [fol. 146] County, Texas, there came on to be tried before the Honorable Court and a jury the above entitled and numbered cause; whereupon there came on to be heard certain matters before the selection of the jury for the trial of said cause, and the following testimony and proceedings were had in connection therewith, to-wit:

Motion to Disqualify Judge

Mr. Crenshaw: The defendants are not ready for trial of this cause at the present time and in this court for the reason that, with all due respect to the gentleman sitting upon the bench, defendants believe, and through their counsel charge that the Honorable Paul A. Martineau, now attempting to act as Judge of this, the District Court for the Ninety-Fourth Judicial District of Texas, has not been and is not now the duly elected and qualified Judge of said court.

The Court: I will overrule the motion.

Mr. Crenshaw: Note our exception.

Mr. Crenshaw: Now, if the Court please, in presenting our evidence there are some of these orders that I think

are necessary, but it would be of slight benefit to the Court to read the entire order, and if agreeable to the Court and [fol. 147] counsel I will describe those briefly, and when I come to the orders that do have a bearing on the motion I will read them. The first is order No. 1 that was entered in the bankruptcy proceedings in the matter of Missouri Pacific Railroad Company, Debtor, in the Federal District Court at St. Louis, No. 6935, Eastern Division, Eastern Judicial District of Missouri, which was in response to a petition filed by the Missouri Pacific Railroad Company for reorganization in bankruptcy, and the order approves the petition as filed and makes certain administrative orders as to how to get the property in shape for the Court to take charge of it. That related to the Missouri Pacific Railroad Company only.

(The same being by the Court Reporter marked, "Defendants Exhibit No. 1—BEA," and the same being in words and figures as follows, to-wit:)

DEFENDANTS' EXHIBIT No. 1

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

ORDER

Upon due consideration of the petition of Missouri Pacific Railroad Company, the above named Debtor, verified March 31, 1933, and filed herein this day, stating that such Debtor is unable to meet its debts as they mature and that [fol. 148] it desires to effect a plan of reorganization in accordance with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and the Court being satisfied that such petition complies with said Section and has been filed in good faith, it is Ordered:

(1) That said petition be, and it is hereby, approved as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

(2) That the Debtor be, and it hereby is, authorized and directed, pending further order of this Court in the

premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of the Debtor, wherever situated, whether in this state, judicial circuit or elsewhere, and to manage and conduct its business as a railroad company, and to this end to exercise its authority and franchises and discharge all public duties obligatory upon it, and to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, to collect and receive the income, rents, revenues, tolls, issues and profits of said property, to collect all outstanding accounts and all dividends and interest on securities belonging to it, to make such advances to its subsidiary corporations as are necessary to protect the Debtor's interest therein, in the same manner that it would be entitled and bound to do in its own right, and to the extent necessary to protect and preserve, [fol. 149] the property of the Debtor to make and pay for additions and betterments to the railroads and property of the Debtor, all according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein. The Debtor is authorized in its discretion from time to time until further order of this Court out of funds now or hereafter coming into its hands to pay:

(a) All taxes and assessments due or to become due upon the property of the Debtor.

(b) All necessary expenses of operating the railroads and conducting the business of the Debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents or employees retained by the Debtor, ticket, traffic, car mileage and car per diem balances, interline accounts, freight and overcharge claims and amounts for car and equipment repairs as may become due to connecting or other railroad companies or other common carriers, including all sums now due or which may hereafter become due to other persons or corporations for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges and other railroad facilities, and such sums as may be necessary to comply with the obligations of the Debtor under contracts by virtue of which said occupation or

[fol. 150] use may now or hereafter be enjoyed (but such payments shall not constitute affirmations of said contracts, or any of them);

(c) The following claims incurred by the within six months preceding the date of this order, to-wit: Wages, salaries, fees and other charges due and payable for services rendered to the Debtor in the usual and customary operation of its properties and the conduct of its current business, unpaid material and supply accounts incurred in the operation of said properties, *unpaid* and outstanding pay checks and wage checks representing labor actually performed for the Debtor, and unpaid ticket, traffic, car mileage and car per diem balances, interline accounts, freight and overcharge claims and amounts for car and equipment repairs incurred by the Debtor;

(d) The cost of maintaining the corporate existence of the Debtor, including the necessary expenses of the preservation of records, and the registration and transfer of its stocks and bonds and trustee's charges under indentures under which securities of the Debtor have been issued.

(3) The Debtor shall close its present books of account as of the close of business on March 31, 1933. The Debtor shall open new books of account as of the opening of business on April 1, 1933, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disburse-[fol. 151] ments of the Debtor, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the Debtor are presently deposited as shall be selected by the Debtor, or in such other bank or banks as shall be selected and approved by this Court.

(4) Within forty days after the entry of this order, the Debtor shall file with the Clerk of this Court a statement of the Assets and Liabilities of the Debtor as of the close of business on March 31, 1933, and on or before the last business day of each calendar month thereafter shall file with said Clerk a statement of the Assets and Liabilities of the Debtor as of the close of business on the last day of the preceding month together with a summary statement of the

revenues and expenses of the Debtor of the preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor.

(5) This Court reserves full right and jurisdiction to make from time to time such orders as the Court shall deem proper, appointing a trustee or trustees of all of said Debtor's property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of said Debtor, fixing the time within which any plan of reorganization shall be proposed, accepted and confirmed, requiring the Debtor to file such schedule and submit such information as may be [fol. 152] necessary to disclose the conduct of the Debtor's affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper

C. B. Faris, District Judge.

Dated March 31, 1933.
Filed March 31st, 1933. Jas. J. O'Connor, Clerk.

Endorsement: Filed in evidence by Defendant 8-27-43. Ben A. Ligon, District Clerk, Nueces Co., Texas, by Louise Eubank, Dy.

Mr. Crenshaw: After the filing and approval of that petition there was another petition filed by a corporation known as the Missouri Pacific Railroad Corporation in Nebraska, The Beaumont, Sour Lake & Western Railway Company, St. Louis, Brownsville and Mexico Railway Company, San Antonio, Uvalde & Gulf Railroad Company, and Houston, North Shore Railway Company, in which those companies, of course we are interested only in the St. Louis, Brows- [fol. 153] ville Mexico Railway Company. They alleged that more than a majority of their capital stock was owned by the Missouri Pacific, either directly or indirectly, and showing further that these parties, including the St. Louis,

Brownsville and Mexico Railway Company, were unable to meet their debts as they matured and desired to effect a plan of reorganization in connection with or as part of the plan of the Missouri Pacific pursuant to Section 77, Article VIII of the Acts of Congress relating to bankruptcy. The Court upon the filing of that petition enters this order No. 11, dated May 2, 1933, in which it approved the petition as filed and admitted these intervening corporations into the bankruptcy already pending, and called on the corporations for certain lists and data, and reserving full right to make any further orders.

(The same being by the Court Reporter marked, "Defendants Exhibit No. 2—BEA," and the same being in words and figures as follows, to-wit:)

DEFENDANTS' EXHIBIT No. 2

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In Proceedings for the Reorganization of a Railroad

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

ORDER

ON PETITION OF MISSOURI RAILROAD CORPORATION IN NEBRASKA, ET AL.

[fol. 154] Upon due consideration of the petition of: Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; St. Louis, Brownsville and Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company, and Houston North Shore Railway Company, Debtors, verified May 1, 1933, and filed herein under Section 77 of Chapter VIII of Acts of Congress relating to bankruptcy, showing that more than a majority of the capital stock of the Debtors joining in said petition is owned by Missouri Pacific Railroad Company, Debtor, either directly or indirectly through an intervening medium, and showing further that the

Debtors joining in said petition are unable to meet their debts as they mature, and that they desire to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company, Debtor, pursuant to said Section 77, and the Court being satisfied that said petition complies with Section 77 and has been filed in good faith, it is Ordered:

(1) That said petition of Missouri Pacific Railroad Corporation in Nebraska et al., Debtors, be, and it is hereby approved, as to each and all of the Debtors joining therein, as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and in this proceeding in which the petition of Missouri Pacific Railroad Company has been filed.

(2) That the order heretofore entered herein on March 31, 1933, with respect to operating of railroads and *and* [fol. 155] other property of Missouri Pacific Railroad Company, payments of taxes, expenses, six months claims, and other items, and the exercise of other powers and privileges as therein set forth, and the orders entered herein on April 7, 1933, with respect to payments to pensioned employes and settlement of prior interline and certain other accounts, and the order entered herein on April 15, 1933, with respect to honoring of outstanding pay checks, are hereby extended to and made applicable to all the Debtors parties hereto.

(3) That the Debtors joining in the petition, hereby approved, of Missouri Pacific Railroad Corporation in Nebraska et al., shall close their present books of accounts as of the close of business on April 30, 1933, and shall open new books of account as of the opening of business on the following day, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts, and disbursements of the Debtors, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into their hands in such of the banks in which funds of the Debtors are presently deposited as shall be selected by the respective Debtors, or in such other bank or banks as shall be selected by them and approved by this Court.

(4) That within forty days after the entry of this order, the Debtors joining in said petition shall file with the Clerk of this Court a statement of their assets and liabilities as

[fol. 156] of the close of business on April 30, 1933, and on or before the last business day of each calendar month thereafter shall file with said Clerk a statement of their assets and liabilities as of the close of business on the last day of the preceding month together with a summary statement of their revenues and expenses of such calendar month. Such statements may be made on a consolidated basis as to any Debtors all of whose capital stock is owned by any other Debtor. All such statements shall be certified as correct by the chief accounting officer of the respective Debtors.

(5) That for cause shown, the time within which the Debtors joining in said petition shall prepare the lists of their bondholders, creditors, and stockholders, and other information required by clause (c) of Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy is hereby extended to June 15, 1933.

(6) That this Court reserves full right and jurisdiction to make from time to time such orders as the Court shall deem proper, appointing a trustee or trustees of the Debtors' property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of the Debtors, fixing the time within which any plan of reorganization shall be proposed, accepted, and confirmed, requiring the Debtors to file such schedules and submit such information as may [fol. 157] be necessary to disclose the conduct of the Debtors' affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting, or otherwise modifying this order as the Court may at any time seem proper.

/s/ B. Faris, District Judge.

Dated May 2d, 1933.

Filed May 2, 1933. Jas. J. O'Connor, Clerk.

Endorsement: Filed in evidence by Defendant 8-27-43. Ben A. Ligon, District Clerk, Nueces Co., Texas, by Louise Enbank, Dy.

Mr. Crenshaw: Then in the whole case the Court on June 22, 1933, made and entered its order No. 40 appointing L. W. Baldwin and Guy A. Thompson as Trustees temporarily of each of those railroads of all and singular the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, and naming the railroads and including the St. Louis, Brownsville and Mexico Railway Company. The Court gave the Trustees the powers usually given Trustees in bankruptcy cases and ordered the filing of bond in the sum of $50,000.00, and [fol. 158] directed the giving of notice to the creditors and stockholders of the hearing to be held before the Judge of that court on the 25th day of July, 1933 by publication in one daily newspaper once a week for two consecutive weeks in each of the cities; ordering that all persons, firms and corporations having in their possession any of the property of the Debtors to deliver the same to the Trustees, and to make such transfers, assignments and conveyances in connection therewith as may be necessary and proper and requiring the officers, directors, agents and employees to deliver to the Trustees, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other property in their hands.

(The same being by the Court Reporter marked, "Defendants Exhibit No. 3-BEA," and the same being in words and figures as follows, to-wit:)

DEFENDANTS' EXHIBIT No. 3

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad.

ORDER APPOINTING TRUSTEES

It appearing to the Court that it is advisable at this time to appoint Trustees of the estates of all of the Debtors heretofore or hereafter made parties to this proceeding,

[fol. 159] and it appearing further that the Interstate Commerce Commission has selected and designated a panel of standing trustees, qualified for service as such, pursuant to subdivision (c) of Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy, which panel contains the names of L. W. Baldwin and Guy A. Thompson, both of St. Louis, Missouri,

It is Ordered:

1. That the said L. W. Baldwin and Guy A. Thompson be and they are hereby appointed temporarily Trustees of all and singular the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of Missouri Pacific Railroad Company; New Orleans, Texas & Mexico Railway Company; International-Great Northern Railroad Company; Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; St. Louis, Brownsville & Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company; and Houston North Shore Railway Company, Debtors; which appointment, as well as the other provisions of this order, shall be effective as of the beginning of business on July 1, 1933. Such appointment shall also apply to the estates of all Debtors hereafter becoming parties to this proceeding, from and after the respective dates of approval of the petitions of such subsequent Debtors. The said Trustees shall have all of the title, and subject to the control of this Court and consistently with the provisions of Section 77 of Chapter VIII [fol. 160] of the Acts of Congress relating to Bankruptcy shall exercise all of the powers of Trustees appointed pursuant to Section 44 or any other section of the Acts of Congress relating to Bankruptcy.

2. That said Trustees shall have all of the powers, rights and privileges heretofore granted to or conferred upon the respective Debtors, or any of them, pursuant to any and all of the orders heretofore entered by this Court in this proceeding, and each and all of the orders heretofore entered in this proceeding shall, with respect to the Trustees and the property in their possession, be of like force and effect as though said Trustees were therein specifically named in place of said respective Debtors, all of said orders being hereby incorporated in and made a part of this order

by reference. The Trustees shall pay out of the funds coming into their hands, as such Trustees, the cost of maintaining the corporate organization of the Debtors, in addition to the necessary expense of preserving their records, registration and transfer of their stocks and bonds, and Trustees' charges under indentures under which securities of the Debtors have been issued.

3. That within ten (10) days from and after July 1, 1933, said Trustees shall each execute and file with the Clerk of this Court a bond or bonds with one or more sureties approved by the Clerk of this Court, for the benefit of whom it may concern, in the sum of $50,000, conditioned to the effect that they will well and truly perform the duties of their office, and duly account for all moneys and property [fol. 161] whatsoever which may come into their hands, and abide by and perform all things which they shall be directed by the Court to do.

4. That the Debtors shall give notice to their creditors and stockholders of a hearing to be held before the undersigned Judge, in the Court Room of the United States District Court, Federal Building, St. Paul, Minnesota, on the 25th day of July, 1933, at eleven o'clock in the forenoon, Central Standard Time, to determine whether such appointment of said Trustees shall be made permanent or shall be terminated, or a substitute Trustee or Trustees or an additional Trustee or Trustees shall be appointed by the Court, by publishing notice of such hearing once a week for two consecutive weeks in one daily newspaper published and of general circulation in each of the cities of St. Louis and Kansas City, Missouri; Houston, Texas; Omaha, Nebraska; Little Rock, Arkansas; New Orleans, Louisiana, and New York, New York.

5. That all persons, firms and corporations having in their possession any of the property of the Debtors are hereby ordered to deliver the same to the Trustees, and to make such transfers, assignments and conveyances in connection therewith as may be necessary and proper; and each and every of the officers, directors, agents and employees of the Debtors is hereby required to turn over and deliver to said Trustees, or their duly constituted repre-

sentatives, any and all books of account, vouchers, [fol. 162] papers, deeds, contracts, notes, securities, accounts, moneys or other property in his or their hands, or under his or their control belonging to or in the possession of the Debtors, and to abide by and conform to such orders as may be given from time to time by said Trustees, or their duly constituted representatives, in conducting the operation of the properties of the Debtors and in the discharge of their duties as Trustees.

6. That the Court reserves full right and jurisdiction to make from time to time such additional orders herein as to the Court shall seem proper, as well as any orders amplifying, extending, limiting or otherwise modifying this order, and in all respects to regulate and control the conduct of said Trustees.

C. B. Faris, District Judge.

Dated June 22nd, 1933. Filed June 22, 1933. Jas. J. O'Connor, Clerk.

Endorsement: Filed in evidence by Defendant 8-27-'43. Ben A. Ligon, District Clerk, Nueces Co., Texas. By Louise Eubank, Dy.

Mr. Crenshaw: Later, on the 25th day of July, 1933, at this hearing which the Court set, he entered order No. 57 confirming the appointment of those two men as joint Trustees of all these railroads, including the one involved in this suit, and repeating his orders as to the delivery [fol. 163] of all property to these Trustees, and made their appointment permanent.

(The same being by the Court Reporter marked, "Defendants Exhibit No. 4-BEA," and the same being in words and figures as follows, to-wit:)

DEFENDANTS' EXHIBIT No. 4

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In Proceedings for the Reorganization of a Railroad

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

ORDER CONFIRMING APPOINTMENT, ENTERED JUNE 22, 1933, TEMPORARILY APPOINTING TRUSTEES

On March 31, 1933, the Missouri Pacific Railroad Company, Debtor, filed its petition herein, stating that Debtor was unable to meet its obligations as they matured, and would mature and that it desired to effect a plan of reorganization, in accordance with the provisions of Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

The Court, being satisfied that said petition complied with said section of the Act and that it was filed in good faith, thereupon, on March 31, 1933, approved said petition as properly filed, under said section of the Act, and entered an order, authorizing the Debtor, pending further order of this Court in the premises, to operate and maintain the [fol. 164] railroads and property of the Debtor, wherever situated, and to manage and conduct its business, and to exercise general and specified powers, according to law, and subject to such supervision and control by the Court as the Court might exercise by further orders entered herein.

Subsequent to said date, petitions having been filed by various subsidiaries of said Missouri Pacific Railroad Company, Debtor, in this cause, and the Court, having fully considered said petitions, approved the same as properly filed under said section of the Act and entered orders authorizing said Debtors, pending the further order of this Court, in the premises, to continue to operate and maintain the railroads and property of said Debtors, wherever situated, and to manage and control the business of said Debtors and to exercise the different, sundry powers, according to law, specified in said orders, subject to the

supervision and control of this Court as the Court might exercise by further orders entered herein.

On June 22, 1933, pursuant to the provisions of Section 77 of said Act, this Court entered an order, temporarily appointing L. W. Baldwin and Guy A. Thompson, both of St. Louis, Missouri, as temporary Trustees for the railroads and property of, all and singular, the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of all of said Debtors, said Trustees having been selected from a panel of standing trustees, designated and qualified for service as such, pur- [fol. 465] suant to sub-division (c) of Section — of Chapter VIII of the Act of Congress relating to bankruptcy, said order appointing Trustees to be effective as of the beginning of business on July 1, 1933, and said order specifying that such appointment should apply to the estates of all Debtors hereafter becoming parties to this proceeding from and after the respective dates of approval of the petitions of such subsequent Debtors.

And said order, temporarily appointing said Trustees, having provided that notice should be published once a week for two consecutive weeks in one daily newspaper of general circulation in each of the Cities of St. Louis, and Kansas City, Missouri; Houston, Texas; Omaha, Nebraska; Little Rock, Arkansas; New Orleans, Louisiana, and New York, New York, notifying all persons, firms and corporations having in their possession any of the property of the Debtors to deliver the same to the Trustees, and notifying the creditors and stockholders of said Debtors that, on the 25th day of July, 1933, at eleven o'clock in the Forenoon, Central Standard Time, the undersigned Judges, in the Court Room of the United States District Court at the Federal Building in St. Paul, Minnesota, would determine whether such appointment of such Trustees should be made permanent or should be terminated or a substitute Trustee or Trustees should be appointed by the Court, and, it appearing to the Court that, within ten days from and after July 1, 1933, each of said Trustees executed and filed with the Clerk [fol. 466] of the United States District Court for the Eastern Division, Eastern Judicial District, Missouri, a bond, with solvent sureties, in the sum of fifty thousand dollars ($50,000.00), each, conditioned, as required in said order temporarily appointing said Trustees, entered June 22, 1933, and it further appearing to the Court that said

Debtors have filed with the Court their report of compliance with said order, and that all known creditors and stockholders of the Debtors have been notified of this hearing, in accordance with the provisions of Section 77 of Chapter VIII of said Act, and this hearing being now held in accordance with said notice and the provisions of said Act, and certain creditors and stockholders of the Debtors having appeared by Counsel at this hearing, and the Court, having heard the arguments of said Counsel, and being duly advised in the premises and being of the opinion that the interests of all parties will be best conserved by affirming, until the further order of this Court, the order entered by the Court herein on June 22, 1933, temporarily appointing said L. W. Baldwin and Guy A. Thompson, Trustees of the railroads and properties of said Debtors; it is, therefore,

Ordered, Adjudged and Decreed that said order temporarily appointing said L. W. Baldwin and Guy A. Thompson, Trustees for the railroads and properties of said Debtors, entered June 22, 1933, Be, and the Same Is Hereby, Confirmed and Approved, and said appointment of said Trustees is hereby made permanent, and the said L. W. [fol. 167] Baldwin and Guy A. Thompson are hereby appointed permanent Trustees of, all and singular, the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of the Missouri Pacific Railroad Company, New Orleans, Texas & Mexico Railway Company, International-Great Northern Railroad Company, Missouri Pacific Railroad Corporation in Nebraska, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, San Antonio, Uvalde & Gulf Railroad Company, Houston North Shore Railway Company and Missouri-Illinois Railroad Company, and such appointments shall also apply to the estates of all Debtors hereafter becoming parties to this proceeding from and after the respective dates of the approval of the petitions of such subsequent Debtors.

And said Trustees shall have all the title and be subject to the control of the Court and, consistently with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, shall exercise all of the powers of trustees appointed pursuant to Section 44 of any other section of the Act of Congress relating to bankruptcy.

Such Trustees shall have all of the powers, rights and privileges heretofore granted to or conferred upon them while temporary Trustees, and all of the rights, powers and [fol. 168] privileges heretofore granted to or conferred upon the respective Debtors, or any of them, pursuant to any or all of the orders heretofore entered by this Court in this proceeding, and each and all of the orders entered in this proceeding shall, with respect to the Trustees and the properties in their possession, be of like force and effect as though said Trustees were therein specifically named, instead of said respective Debtors, all of said orders being herein incorporated in and made a part of this order by reference.

And all persons, firms and corporations having in their possession any of the property of the Debtors or any of the property of the Debtors subsequently becoming parties to this proceeding are hereby ordered to deliver the same to said Trustees and to make such transfers, assignments and conveyances in confection therewith as may be necessary and proper; and each and every of the officers, directors, agents and employes of the Debtors are hereby required to turn over and deliver to said Trustees, or their duly constituted representatives or agents, any and all books of account, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other property in his or their hands, or under his or their control, belonging to or in possession of any of said Debtors; and to abide by and conform to such orders as may be given from time to time by said Trustees, or their duly constituted representatives, in conducting the operations of the Debtors, and in the dis- [fol. 169] charge of their duties as such Trustees.

And such Trustees are hereby authorized and directed to run, manage, maintain and, operate the railroads and properties of the Debtors, wheresoever situated, and to manage and conduct the business of each of said respective Debtors, and to exercise such sundry other powers according to law and subject to the supervision and control of the Court as the Court may exercise by other orders entered herein, all as set forth in the order of this Court temporarily appointing said Trustees, entered June 22, 1933, and in the supplemental order appointing Trustees, entered June 30, 1933, and in the order granting Trustees authority to employ Attorneys, entered July 1, 1933.

And the Court reserves full right and jurisdiction to make, from time to time, such other and further orders as the Court shall deem proper, amplifying, extending, limiting or otherwise modifying such orders of June 22, 1933, temporarily appointing said Trustees, and said orders of June 30, 1933, and July 1, 1933, and, in all respects to regulate and control the conduct of said Trustees.

C. B. Faris, U. S. District Judge.

Dated: St. Paul, Minn., July 25, 1935.
Received and filed Jul. 26, 1933. Jas. J. O'Connor, Clerk.
Endorsement: Filed in evidence by Defendant 8-27-'43.
Ben A. Ligon, District Clerk, Nueces Co., Texas, by Louise Eubank, Dy.

[fol. 170] Mr. Crenshaw: Now, there was an order entered in the Court up there, I think it is really order No. 18, although in a later order the Court referred to it as 19. My recollection is that 19 is only one paragraph, and in amending he amended the fourth paragraph. We don't offer that in evidence, but only state it for the information of the Court. Counsel, it was with respect to the injunction against any sort of proceedings against the Trustees or Debtor companies. I have No. 18. I was wrong about that. I find I have order No. 18, which I believe is the one the Court intended to refer to, paragraph 4. (Counsel reading the paragraph to the Court.)

Mr. Tarlton: If Your Honor, please, we don't object to the admission of the testimony without offering any statement that the order was intended to be 18 instead of 19.

Mr. Crenshaw: I didn't know before that wasn't correct. I will get 19 so the Court may see what it is.

Mr. Tarlton: Our position is that the order repealed is 19.

Mr. Crenshaw: We are willing to leave 18 like it is, if counsel insists. I think in fairness to them and the Court I ought to state what I believe are the true facts about it.

(The same being by the Court Reporter marked, "Defendants Exhibit No. 5—BEA," and the same being in [fol. 171] words and figures as follows, to-wit:)

DEFENDANTS' EXHIBIT No. 5

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

In Proceedings for the Reorganization of a Railroad

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

ORDER GRANTING ADDITIONAL AUTHORITY TO DEBTORS AND RESTRAINING CERTAIN ACTIONS

Upon due consideration of the oral motion of Missouri Pacific Railroad Company; New Orleans, Texas & Mexico Railway Company; International-Great Northern Railroad Company; Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; St. Louis, Brownsville & Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company; and Houston North Shore Railway Company, Debtors, appearing by their counsel, it is Ordered:

(1) That pending further orders of this Court herein, the Debtors, and each of them, are hereby authorized in the due and normal course of their business: (a) to make conveyances of unused or abandoned rights-of-way or other real estate not necessary in the transaction of the business of the Debtors, and to exercise such sale, conveyance, exchange and release rights as are available to them under outstanding deeds of trust, mortgages, trust indentures, and similar instruments, and to use the proceeds of sale of released property as therein provided; (b) to take such [fol. 172] steps as may be required for abandonment of unprofitable lines or changes in service, and to enter into and carry out agreements for use, relocations, or crossings of railroad tracks and rights-of-way; (c) to exercise Debtor's rights and remedies under leases, and to enter into, modify, supplement, or continue in effect, pending and subject to the final plan of reorganization in this proceeding,

such operating or industrial agreements as in the judgment of the Debtors may be to the best interests of the estates of such Debtors; and (d) to purchase or lease such additional lands along existing rights-of-way as may in the judgment of the Debtors be necessary from time to time in the conduct of their business; all of the foregoing powers to be exercised according to law and subject to such supervision and control by this Court as the Court may exercise by further orders entered herein.

(2) That pending further orders of this Court, the Debtors, out of funds now or hereafter coming into their hands, may, in addition to such authority as has heretofore been granted, pay (a) premiums now or hereafter coming due on surety company bonds given for the benefit of the respective Debtors, (b) court costs and costs incurred before various commissions, (c) sums due from time to time to the Railroad Credit Corporation under the marshaling and distributing plan as surcharges on freight rates, together with interest on delayed payments, and (d) claims for personal injuries to employees, workmen's compensa-[fol. 173] tion awards, and claims of representatives of deceased employees arising out of the death of such employees.

(3) That each of the Debtors, parties hereto, shall be allowed until October 31, 1933 (unless the time be further extended by order of this Court) within which to disaffirm any contracts entered into before the respective dates of approval by the Court of the respective petitions of the Debtors, filed herein. Such disaffirmances shall be indicated by notice to that effect in writing served on the other party or parties to such contract and copy with proof of service filed of record in this proceeding, and continued operation by any Debtor under any of said contracts within said period allowed for disaffirmance shall not be deemed to conclude such Debtor in respect of such election or to constitute an election.

(4) That pending further order of the Court in the premises, the respective Debtors, parties hereto, are authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary in their judgment for the recovery or proper protection of their

property or rights, and to make settlements of any thereof; and likewise to defend or liquidate by written agreement or consent judgments, any claims, actions, proceedings, or suits now pending against any of said Debtors, or which may hereafter be asserted or be brought in any court or before any officer, department, commission, or tribunal to [fol. 174] which any such Debtors is or shall be a party, but no payments shall be made by the Debtors in respect of any such claims accruing prior to the respective dates of approval of the petitions of the respective Debtors herein or in respect to any actions, proceedings, or suits on such claims without authority or direction of this Court, and no action taken by the Debtors in defense or liquidation of any such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon or right in the property or funds in the possession of the Debtors that otherwise would not exist.

(5) That the time within which the respective Debtors shall file with the Clerk of the Court monthly statements of their assets and liabilities and summary statements of their revenues and expenses is hereby extended to forty-five days after the close of each calendar month. If no exceptions are filed within ten days thereafter, same shall stand approved.

(6) That all persons, firms, and corporations, whatsoever and wheresoever situated, located, or domiciled, other than the Debtors are hereby ordered to deliver to the respective Debtors the property and premises of the respective Debtors and to make such transfers, assignments, and conveyances in connection therewith as may be necessary or proper, and are hereby restrained and enjoined from interfering with, attaching, garnisheeing, levying upon and enforcing liens upon, or in any manner whatsover disturb- [fol. 175] ing any portion of the assets, goods, money, railroads, properties, and premises belonging to or in the possession of any of the Debtors, or from taking possession of, or in any way interfering with, the same, or any part thereof, or from interfering in any manner to prevent the discharge by the Debtors of their duties in the operation of said property and business under the orders of this Court.

(7) That this Court reserves full right and jurisdiction to make, from time to time, such orders as the Court shall

deem proper, including any orders amplifying, extending, limiting, abrogating or otherwise modifying this order.

C. B. Faris, District Judge.

Dated May 9th, 1933.
Filed May 13, 1933. Jas. J. O'Connor, Clerk.
Endorsement: Filed in evidence by Defendant 8-27-'43. Ben A. Ligon, District Clerk, Nueces Co., Texas. By Louise Eubank, Dy.

Mr. Crenshaw: The next in line along that line is order No. 116, entered November 14, 1933, in which the Court "From and after the entry of this order, all suits (other than claims for injuries to or death of employees), wherever pending, against any of the Debtors, shall be stayed until after final decree in this cause," etc. (The same being by the Court Reporter marked, "Defendants Exhibit No. 6—BEA," and the same being in words and figures [fol. 176] as follows, to-wit:

DEFENDANTS' EXHIBIT No. 6

IN THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

In Proceedings for the Reorganization of a Railroad No. 6935

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

ORDER STAYING PENDING SUITS AGAINST DEBTORS UNTIL AFTER FINAL DECREE

Upon reading the motion of Trustees, asking that a stay order be entered in this cause, staying the further prosecution of all suits (other than claims for injuries to or death of employes) against the Debtors until after final decree in this cause, and, upon further consideration of General Order No. 19, entered in this cause:

It Is Ordered and Decreed that Paragraph 4 of General Order No. 19, which authorizes the further prosecution of suits pending in any court or tribunal of competent juris-

diction, and the liquidation of all claims, by reducing same to judgment in such jurisdiction where the same are pending, shall be, and the *the* same is hereby, modified to the following extent:

From and after the entry of this order, all suits (other than claims for injuries to or death of employes), wherever pending, against any of the Debtors, shall be stayed until after final decree in this cause, and the continued prosecution of any and all suits (other than claims for injuries [fol. 177] to or death of employes) which have for their object the enforcement of any lien or judgment against the property of the Debtors in the hands of the Trustees shall be, and the same is, hereby, enjoined until after final decree entered in this cause.

C. B. Faris, United States District Judge.

Dated Nov. 14, 1933.
Filed Nov. 17, 1933. Jas. J. O'Connor, Clerk.

Endorsement: Filed in evidence by Defendant 8-27-'43. Ben A. Ligon District Clerk, Nueces Co., Texas. By Louise Eubank, Dy.

Mr. Crenshaw: And later on December 2nd, 1935, the Court amended the order by entering Order No. 116A (The same being by the Court Reporter marked, "Defendants Exhibit No. 7—BEA," and the same being in words and figures as follows, to-wit:

DEFENDANTS' EXHIBIT No. 7.

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI.

In Proceedings for the Reorganization of a Railroad No. 6835

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

AMENDED ORDER STAYING CERTAIN PENDING SUITS AGAINST DEBTORS UNTIL AFTER FINAL DECREE

[fol. 178] Whereas, subdivision (j) of Section 77 of the Act relating to Bankruptcy, as amended August 27, 1935,

has made necessary certain changes in orders respecting the staying of suits against the debtors, Now It Is Ordered:

That Order No. 116, heretofore entered in these proceedings on November 14, 1933, is hereby repealed.

That commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings, provided, however, that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated.

C. B. Faris, United States Judge for the Eighth Judicial Circuit sitting as District Judge for the Eastern Division, Eastern Judicial District of Missouri.

Filed Dec. 2, 1935. Jas. J. O'Connor, Clerk.

Endorsement: Filed in evidence by Defendant 8-27-43. Ben A. Ligon District Clerk, Nueces Co., Texas. By Louise Eubank, Dy.

Mr. Crenshaw: The only other order we have to offer at this time is Order No. 416, in which on the 26th day of December, 1935, the Court accepted the resignation of [fol. 179] L. W. Baldwin and continuing Guy A. Thompson as sole Trustee of the Debtor corporation, including the St. Louis, Brownsville and Mexico Railway Company, and ordering the correction of the bond already on file by deleting the name of L. W. Baldwin and approving the bond as corrected so it shows that Mr. Thompson, as we contend, is now the Trustee of the St. Louis, Brownsville and Mexico Railway Company, and that is borne out by the original petition and amended petition, the plaintiff should sue him in that capacity and set up the authority on which he acts.

(The same being by the Court Reporter marked, "Defendants Exhibit No. 8—BEA," and the same being in words and figures as follows, to-wit:)

DEFENDANTS' EXHIBIT No. 8

IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

In Proceedings for the Reorganization of a Railroad No. 6935

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

ORDER ACCEPTING RESIGNATION OF L. W. BALDWIN AS CO-TRUSTEE, AND CONTINUING GUY A. THOMPSON AS SOLE TRUSTEE

L. W. Baldwin having this date tendered his resignation as Co-Trustee of the debtor companies parties to this proceeding; and the Court being fully advised in the premises, It Is Ordered:

That the resignation of L. W. Baldwin as Co-Trustee of the debtor companies involved in these reoragnization [fol. 180] proceedings, be and the same is hereby accepted, effective at twelve o'clock noon of this date.

That effective at twelve o'clock noon of this date, Guy A. Thompson, the now duly appointed, qualified, and acting Co-Trustee of the debtors herein, shall continue as sole Trustee; that all orders in this proceeding now affecting the Trustees of said Debtors shall continue with like effect with respect to said Guy A. Thompson as continuing sole Trustee; that said Guy A. Thompson, in his capacity as sole Trustee, shall succeed to all rights and liabilities of said L. W. Baldwin and Guy A. Thompson as Trustees of the several debtor companies, and may sue or be sued in his capacity as sole Trustee on any cause of action that could heretofore have been prosecured against or in behalf of said Co-Trustees of the respective debtors.

That the bond of Guy A. Thompson, Trustee, in the amount heretofore approved, shall be corrected in conformity with this order, and when so corrected, shall be accepted by the Clerk of this Court.

That this Court reserves the right to rescind, modify, amplify, or in any manner change the terms of this order as may hereafter to the Court seem proper.

Dated this 26th day of December, 1935.

C. B. Faris, United States Circuit Judge for the Eighth Circuit, sitting as District Judge for the Eastern Division, Eastern Judicial District of Missouri.

[fol. 181] Filed Dec. 26, 1935. Jas. J. O'Connor, Clerk.

Endorsement: Filed in Evidence by Defendant 8-27-43 Ben A. Ligon, District Clerk, Nueces Co., Texas by Louise Eubank, Dy.

Mr. Farlton: The plaintiff offers on the special pleas, first, the Original Petition filed by the plaintiff on the date of the file mark, May 25, 1942. (The same being by the Court Reporter marked, "Plaintiff Exhibit No. 9—B.C.A." and the same being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 9:

No. 24,588-C

THE TEXAS-MEXICAN RAILWAY COMPANY

vs.

ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, et al.

In the 94th District Court, Nueces County, Texas

Plaintiff's Original Petition

Now comes the Texas Mexican Railway Company, a private railroad corporation duly incorporated under the laws of Texas, and domiciled in Webb County, Texas, hereinafter called Plaintiff, complaining of St. Louis, Brownsville & Mexico Railway Company, a private railroad corporation duly incorporated under the laws of Texas, owning and operating a line of railway thru Nueces County, Texas, and having O. K. Dowell as its local agent, who resides in [fol. 182] Nueces County, Texas; and Guy Thompson, Trustee for St. Louis, Brownsville & Mexico Railway Company, having said O. K. Dowell as his local agent, who re-

sides in Nueces County, Texas; hereinafter called Defendants, and for its cause of action Plaintiff represents to the Court:

I

That prior to and on November 1, 1904, and continuously therefrom and now Plaintiff was, has been and is engaged in owning and operating a line of railway in and thru Nueces County, Texas, said line commencing in Corpus Christi and extending westerly from Corpus Christi to Robstown, Texas; thence to Laredo, Texas. The Defendant Brownsville Company on said November 1, 1904, and until about March 31, 1933, operated its trains over the tracks of Plaintiff from Corpus Christi to Robstown under and subject to rights of one certain contract and supplement thereto hereinafter described.

On or about March 31, 1933, Defendant Thompson, Trustee took over operation of said Brownsville Company trains and yet operates same as said Trustee.

Defendant Guy Thompson, Trustee, is now operating the trains of the Defendant St. Louis, Brownsville & Mexico Railway Company, pending reorganization proceedings in behalf of said company under Section 77-B of the Bankruptcy Act; H. R. Safford is the chief acting operating agent of said Trustee with respect to said St. Louis, Brownsville & Mexico Railway Company operations, and [fol. 183] is the duly elected and acting Vice-President of the St. Louis, Brownsville & Mexico Railway Company, and each is actively directing subordinate employees to exercise rights and privileges and to operate trains in the yards of Plaintiff at Corpus Christi and upon its tracks, over its protest and without lawful right, all as is hereinafter fully set forth.

II

(a) On or about November 1, 1904, said Brownsville Company having no railroad track of its own entering the City of Corpus Christi, Texas, and desiring the right to enter said City over the tracks of Plaintiff, entered into one certain written contract with Plaintiff whereby Plaintiff granted to said Brownsville Company, upon the terms and subject to the conditions and limitations in said written contract set forth, a true copy of which is hereto attached as Exhibit 1 and made part hereof for all purposes, the right to operate its trains over the main line, side tracks

and passing tracks, as well as the right to use jointly with Plaintiff its water stations, switches, real estate and all other property and appurtenances as they then existed (unless otherwise provided for in said agreement) which were incident and necessary to the used by the Brownsville Company for the purpose of running its passenger and freight trains over said line of Plaintiff, extending from the center of the crossings of the railroad tracks of the two parties at Robstown, Texas, to the eastern end of the tracks of Plain-[fol. 184] tiff, being a distance of 16 miles, 2956 feet, including the right to use the terminals of Plaintiff at Corpus Christi, and the right to the Brownsville Company to carry over said track such freight, mail, express and passengers as it should desire for its own use and compensation, and the right to generally transact its business as a common carrier over said line, all more fully set forth in Article I of said contract.

(b) Among other conditions and limitations upon which said grant was made and which were expressly set forth in said contract were the following: Engines and cars of said Brownsville Company were to be managed by its employees, subject, however, to the reasonable rules and directions of operating officers of Plaintiff, more fully set forth in Article 2 thereof.

(c) Said contract took effect November 1, 1904, and was to continue for 50 years from said date, unless sooner terminated by the parties, with all its conditions and limitations inuring to the benefit of and becoming binding upon their respective successors and assigns, with the express additional stipulation that said contract could be terminated by either party without giving any reason therefor upon giving 12 months notice of its intent to terminate the same, as more fully set forth in Article 12 thereof.

III

(a) Thereafter and on or about October 1, 1914, Plaintiff, and said Brownsville Company, and Frank Andrews [fol. 185] as Receiver of said Company, entered into an agreement supplementing said original contract, a true copy of which is hereto attached marked Exhibit 2 and made part hereof for all proper purposes, whereby, among other things, Plaintiff, upon the terms and conditions and

limitations therein set forth, extended the rights of said Brownsville Company and its Receiver to operate trains over the main line, side tracks and passing tracks and to use various industry tracks jointly with Plaintiff from the center of the crossing of the lines of said two railroads at Robstown to the western yard limit of Plaintiff at Robstown, being a point 1000 feet west of the west switch stand of Plaintiff at Robstown, together with all tracks and spurs in said yard limits, as more fully set forth in Paragraph 1 of said supplemental agreement.

(b) Article 4 of said original contract, subdivision (a), was amended in certain respects not here necessary to set forth, but the same is fully set forth in Paragraph 2 of said supplemental agreement.

(c) Said original contract was specifically referred to in and was made applicable to said supplemental agreement, where not inconsistent with its terms and provisions, as more fully set forth in Paragraph 4 of said supplemental agreement. Nothing was contained in said supplemental agreement inconsistent with the express conditions and limitations above set forth in Article 12 of said original contract which reserved to both parties the unconditional [fol. 186] right of cancellation upon 12 months notice, and Defendants are each given notice to produce original copies of said contract and supplement upon any trial of this cause or secondary evidence thereof may be offered in evidence.

(d) At the time said contract was executed and for many years thereafter said Brownsville Company had no means of entering the City of Corpus Christi with its own trains except thru exercise of the rights conferred upon it by said contract, but the Defendant Trustee now operates practically all of said Brownsville trains which enter Corpus Christi over tracks of the S. A. U. & G. Railroad Company which is owned or controlled by Missouri Pacific Railroad Company, which also owns or controls said Brownsville Company, both of which are being operated and controlled by the Defendant Trustee pending reorganization as afore said.

(e) The compensation to be paid to Plaintiff by said Brownsville Company for the rights granted to it by said

contract was fixed at $3277.80 per year, plus one-half of all taxes levied and charged against the property jointly used under said contract, plus a proportion of the actual cost of maintaining said tracks and buildings, and of agents, telegraph operators, clerks, and other expenses at Robstown and at Corpus Christi and at intermediate stations jointly used, to be determined by that sum which bears the same proportion to the entire cost as the number of passenger and freight cars moved over said road between said points by said Brownsville Company should bear to the total num-
[fol. 187] ber of cars moved by it and by Plaintiff over said road between said points. Said contract stipulated that maintenance should include repairs and renewals of tracks, and that no expense for such purpose above the sum of $250.00 in any one month could be paid by Plaintiff without consent of said Brownsville Company except in cases of specified emergency, none of which included necessary renewal of tracks resulting from wear and tear.

(f) Said contract was made with the understanding of both parties thereto, and it was then so contemplated by the parties thereto, that said Brownsville Company would make exclusive use of said tracks and property of Plaintiff for movement and handling of all cars into and out of Corpus Christi routed via said Brownsville Company and its successors, which was done until the Missouri Pacific Railroad Company acquired control of both said Brownsville Company and said S. A. U. & G. Company. After acquiring said controls said Brownsville Company and the Defendants gradually withdrew regular operations of all trains and cars from the main line of Plaintiff between Robstown and Corpus Christi, except one passenger train per day each way, and transferred operations of said cars and trains routed via said Brownsville Company into and out of Corpus Christi over the S. A. U. & G. Railroad. Defendants thereby voluntarily abandoned the principal operations under said contract which produced a compensating consideration to Plaintiff at the time said contract was made and thereby escaped performance of a substantial
[fol. 188] part of the consideration promised and obligated by which said contract was procured, yet retained the privileges and benefits accruing to Defendants from said contract.

(g) At the time said contract was made the roadbed and rails of Plaintiff from Robstown to Corpus Christi were designed to withstand at a reasonable maintenance cost the wear and tear imposed by motive powers of the respective sized used by Plaintiff and by said Brownsville Company, and it was not contemplated that, in the exercise of the rights conferred by said contract said Brownsville Company would thereafter subject said track to excessive and unreasonable wear and tear caused by the rapid movement over said tracks of motive power of substantially greater weight than for which said track was designed, as Defendants did and are doing, particularly in the operation of said passenger trains nor, if such should be done, that the Defendants would at the same time divert practically all slower moving cars handled by the Brownsville Company in and out of Corpus Christi, thus shifting to Plaintiff the major portion of the excess cost directly imposed by Defendants using heavier motive power at higher speeds than the track was and is designed for, as Defendants have done, to the great damage of Plaintiff.

(h) The rights secured to said Brownsville Company asserted by Defendants under said contract with respect to movements of cars over the tracks and passing tracks of [fol. 189] Plaintiff, which include the yards and terminals of Plaintiff at Corpus Christi, were solely with respect to cars moving thereto and therefrom as said Brownsville Company as delivering or originating carrier. Said contract did not authorize and does not authorize said Brownsville Company nor Defendant Trustee after having gained access to said tracks and terminals of Plaintiff thru said contract and supplement to handle as a switcher thereof cars which move into or out of Corpus Christi over other lines, particularly over the S. A. U. & G., by Defendants wrongfully and without regard or respect for the rights of Plaintiff, and over its protest, have used and now use said tracks and terminals to switch cars into and out of said yards and to spot such cars on said tracks, which cars move into and out of Corpus Christi over lines other than said Brownsville Company. Plaintiff does not have knowledge of the numbers, weights and dates of said cars moved into and out of Corpus Christi and of cars handled in the yards of Plaintiff not moving via Brownsville Company, but Defendants and each thereof do have, so Plaintiff is informed

and believes, and Plaintiff asks for an accounting of such movements for each day since June 1, 1940.

IV

(a) Prior to October 28, 1940, operating Railway Brotherhoods holding labor contracts with Plaintiff demanded of Plaintiff that it cancel said operating contract and supplement and refuse to permit any further operations upon [fol. 190] or over the above described tracks of Plaintiff except through its own employees under threat of claims being made against Plaintiff for back pay for all operations which had been conducted upon and over said tracks in said yards at Corpus Christi by Defendants, and claiming further compensation with respect to all future similar operations. Said demand was based upon the claim of said employees of their right to perform all said work and, if sustained, would impose and award against Plaintiff in excess of $50,000.00 which this Plaintiff has no reasonable expectation of being able to pay. Not desiring to antagonize its own employees nor to hazard a decision of said claim before the Railway Labor Adjustment Board, and being unable to finance itself in event of an adverse decision to it by said Board upon said claim, and knowing of said operations over the S. A. U. & G. Railroad into and out of Corpus Christi by Defendants, and that said contract rights were being used by Defendants in so far as profitable to Defendants, while avoiding obligations of benefits to Plaintiff, and having expressly reserved to itself the right of cancellation of said contract after twelve months notice, Plaintiff agreed with its employees to and did give written notice on October 28, 1940, exercising its right to terminate and cancel said contract and supplement effective twelve months after November 1, 1940.

(b) Said notice was in writing addressed to Mr. H. R. Safford, Senior Executive Assistant, The St. Louis, Browns- [fol. 191] ville & Mexico Railway Company, who was and is vice-president and the chief operating officer representing the Defendant Trustee in the State of Texas with respect to its operations above set forth, and he acknowledged receipt of said notice on October 31, 1940. Each Defendant is given notice to produce the original of said notice and of said contract and supplement upon each hearing and each

trial of this cause; otherwise secondary evidence of the contents of each will be offered in evidence.

V

(a) Defendants have continuously since November 1, 1941, over the protest of Plaintiff, continued and now continue to use the tracks in the yards of Plaintiff in such fashion as suited and as suits the desires of Defendants. They daily go upon said tracks with locomotives and trains at will without regard for the orders of Plaintiff and its agents, and in defiance of the rights of Plaintiff Defendants daily order switch engines, trains and crews of their own into said yards and at will drive the same over and upon the tracks of Plaintiff without orders from or obedience to the officers and agents of Plaintiff, and thereby create confusion in said yards and interfere with the orderly operations of Plaintiff upon its own tracks, endangering the lives and safety of Plaintiff's employees and property, unless Plaintiff submits to the unlawful and forcible interference with, appropriation and use of Plaintiff's property by Defendants and each of them as aforesaid.

[fol. 192] (b) At the time said contract and supplement thereto were executed each was in all respects legal and valid, and no law has since been enacted which impairs or purports to impair the obligations of said contract, and the same with its cancellation clause was legal and was in full force and effect both at the time Plaintiff gave its notice of cancellation and on November 1, 1941, on which date the right of Defendants and each of them to enter upon and use the property of Plaintiff ended, and there remained in neither Defendant any right of election or choice to longer continue said use under claim of right by virtue of said contract.

(c) After Defendants continued and refused to discontinue said entry and use as aforesaid Plaintiff gave them notice that for each day they should continue such use it would be at a cost to Defendants of $500.00 per day. With said notice Defendants arbitrarily, wilfully and capriciously continued and now continue such use and asserted to Plaintiff that the cost of such use fixed by Plaintiff would not be recognized by Defendants and that they would pay only in accordance with said contract, which Plaintiff says it had cancelled and which was and is no longer in effect. Plain-

tiff says that it had and has the right upon the facts in this petition set forth to prescribe the value of the use of its property appropriated and used by Defendants and each of them over the protest of Plaintiff, and that neither Defendant has the lawful right to longer impose upon Plaintiff the [fol. 193] original contract nor to claim the use to be lawful after having affirmatively refused to agree to the payment for the use which Plaintiff proposed, and in entering upon and using Plaintiff's property after November 1, 1941, each Defendant so doing became and now is a voluntary trespasser upon said property and liable and bound to pay to Plaintiff all damages imposed upon Plaintiff, plus the reasonable value of the use of said property, and exemplary damages by reason of the arbitrary, ruthless and capricious acts as aforesaid.

(d) The privileges exercised and the uses made by Defendants and each of them with respect to Plaintiff's property subsequent to November 1, 1941, as aforesaid, are valuable property rights which are being usurped and enjoyed without due process of law and constitute a flagrant disregard and violation of the constitutional guarantees to Plaintiff by Articles 15 and 14, Section 1 of the Constitution of the United States, and by Article 1, Section 19 of the Constitution of Texas, that the property of Plaintiff shall be taken only thru due process of law.

VI

(a) Plaintiff alleges upon information and belief that employees of Defendants have demanded that they continue and refuse to discontinue use of and operations upon the property of Plaintiff as aforesaid and that Defendants fear if they should discontinue such operations as they were conducting during the existence of said contract, their own employees will assert claims against them for pay from De- [fol. 194] fendants as tho their employees had performed all work on the tracks of Plaintiff which its employees would perform if Defendants discontinued using and operating upon said tracks as aforesaid, and Defendants and each of them have wrongfully and purposely and knowingly continued said operations without lawful right in an effort to avoid the hazard of a controversy with employees over work performed upon the tracks and property of Plaintiff in utter disregard for the rights of Plaintiff in the premises.

(b) Plaintiff alleges that it proposed to Defendants that it would withdraw said cancellation notice if Defendants would agree to indemnify Plaintiff against any loss it might sustain as result of an award against it by the National Railroad Labor Adjustment Board in event the employees of Plaintiff successfully prosecuted their claim for compensation for all work done upon the rails of Plaintiff by the crews of the Defendants, but Defendants refused to agree to assume any liability.

VII

(a) Plaintiff says that it is entitled to judgment jointly and severally against the Defendants for damages in the sum of $500.00 per day for each and every day of such use.

(b) Plaintiff further prays that for each and every day of such use it recover exemplary damages in the sum of $50.00 per day.

(c) Plaintiff further prays that by reason of the notice of [fol. 195] Defendants of special damages in event of successful prosecution by the employees of Plaintiff of a claim for compensation for work performed by the employees of Defendants or either of them on the property of Plaintiff as aforesaid, it have judgment against Defendants and each of them for the amount of such award.

VIII

Plaintiff says that it could lock its switches and meet Defendants and their employees with force by which, alone, Plaintiff may keep Defendants and each of them and their employees and trains off Plaintiff's tracks, but Plaintiff does not do so because Plaintiff fears such course would lead to physical violence and personal injury and property damage, and in order to be protected against the arbitrary and unlawful and wilful acts of Defendants and each of them as aforesaid Plaintiff is without adequate remedy at law and invokes the aid of equity.

Wherefore, premises considered, Plaintiff prays that each Defendant be cited to appear and to answer this petition and upon a hearing Plaintiff prays that it have its injunction against each Defendant and the agents, servants and employees of each from going upon, or from sending motive power and employees of their own upon any track, side track

or terminal of Plaintiff in the City of Corpus Christi or from Corpus Christi to Robstown in the absence of affirmative consent from Plaintiff.

Plaintiff further prays for joint and several judgment [fol. 196] against Defendants for actual damages at the rate of $500.00 per day from and after November 1, 1941, until use of its property by Defendants is discontinued, and for punitive damages at the rate of $50.00 per day.

Plaintiff further prays for interest, costs, and general relief.

J. D. Dodson, E. R. Kleberg, Marcellus G. Eckhardt, Attorneys for Plaintiff.

STATE OF TEXAS,
County of Webb:

——— ———, having been duly sworn upon his oath says: that he has read the foregoing petition for injunction and the facts therein stated are true, except where stated upon information and belief, and those he verily believes to be true, and that he is authorized in behalf of Plaintiff, The Texas Mexican Railway Company, to make this affidavit.

——— ———.

Subscribed and sworn to before me this the — day of May, 1942.

———, Notary Public, Webb County, Texas.

(And Attached Thereto Being the Following Instrument in Words and Figures as follows, to-wit:)

[fol. 197] MEMORANDUM OF AGREEMENT BETWEEN THE TEXAS MEXICAN RAILWAY COMPANY AND THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY

Memorandum of agreement made and entered into this first day of November, A. D., 1904, by and between The Texas Mexican Railway Company, hereinafter called the party of the first part, and the St. Louis, Brownsville & Mexico Railway Company, hereinafter called the party of the second part.

Whereas, the party of the first part owns, controls and operates a line of railroad extending from Robstown to Corpus Christi, in the State of Texas, and whereas the party of the second part desires to acquire the right to run its

trains over the said tracks of the party of the first part, between Corpus Christi and Robstown, Texas, hereinafter more fully described, and,

Whereas, the party of the first part is willing to consent to the acquisition of such right by the party of the second part, for the consideration, upon the terms, and subject to the limitations and conditions hereinafter more fully set forth.

Now Therefore, to the end that the said party of the second part shall use said tracks of the party of the first part, and enjoy the necessary rights and privileges in connection with the operation of said line of railroad, and for the considerations hereinafter set forth, the parties hereto mutually and separately agree as follows:

[fol. 198] Article 1

The party of the first part hereby grants to the party of the second part, for the period hereinafter specified, upon the terms and subject to the conditions and limitations hereafter named, the right to operate its trains over the main line, side tracks, passing tracks, as well as the right to use jointly with the party of the first part, its water stations, switches, real estate and all other property and appurtenances as they now exist, unless otherwise provided for in this agreement which shall be incident and necessary to the use of the said party of the second part for the purpose of running its passenger and freight trains over the said line of the party of the first part, between the points hereinbefore mentioned, said line being understood as extending from the center of the crossing of the two lines at Robstown to the Eastern end of the Texas Mexican Railway, a distance of 16 miles, 2056 feet; and said right of usage to include also the use of the terminals of the party of the first part in Corpus Christi; and the said party of the first part further grants to the said party of the second part, the right to corry over its said tracks, such freight, mail, express and passengers as it may desire and to receive for its own use and compensation all revenue arising from such service, and the further right to generally extend and transact its business as a common carrier over the said line.

Article 2

The maintenance of the line of railway of the first party [fol. 199] jointly used under this agreement, and all im-

provements or additions which may be added under the provisions of this agreement, shall be conducted under the charge and supervision of the first party, and the same shall be kept and maintained in a good and safe condition.

The engines and cars of the second party, while on the railway of the first party, shall be managed by the employes of the second party, subject, however, to the reasonable rules and to the directions of the officers of the Operating Department of the first party.

Time tables for the movement of trains over the railway affected by this agreement, shall be arranged by the joint action of the Superintendents or other officers of the parties hereto. Trains of either party shall have the right of way over all trains of either party of an inferior class; Provided, that when, necessary, the time of trains of less importance of either party may be altered as far as necessary to accommodate the trains of greater importance of the other party, and where trains of equal importance conflict, there should be a division of difference, each party having equal rights with the other, and should any difference arise between the parties, it shall be settled by arbitration as hereinafter provided.

Article 3

In consideration of the grant of rights and privileges, hereinbefore described, the party of the second part covenants and agrees to pay to party of the first part, the fol-
[fol. 200] lowing amounts of money for the said joint use with the party of the first part of the said main tracks, side tracks, passing tracks, appurtenances, and other property hereinbefore referred to; and for the use of the terminals of the party of the first part by the party of the second part at Corpus Christi, the party of the second part shall pay to the party of the first part, at its office in Laredo, Texas, during the entire period of this contract, a fixed annual rental of $3,277.80, said sum to be paid in equal monthly installments of $273.15, on or before the 15th, of each month for the *preceding* month, said amount of $3,277.80, being 2½% of the estimated valuation of the privileges granted.

Article 4

In addition to the sums agreed to be paid by the party of the second part to the party of the first part, as men-

tioned in Article 3 of this agreement, the party of the second part shall also pay to the party of the first part an additional sum as follows, being a proportional charge for the maintenance of said tracks, buildings, etc.:

(a) A certain proportion of the actual cost of maintenance of said main track, side tracks, passing tracks, buildings, etc., of the party of the first part between the points hereinbefore mentioned in Article 1, of this agreement, without any charge for Superintendency, computed on what is known as a "Car Basis", i. e., a sum which shall bear the same proportion to the entire cost of maintenance [fol. 201] of tracks, buildings, etc., as the number of passenger and freight cars moved over said road between said points by the party of the second part, shall bear to the total number of cars moved over said road between said points. It is understood that the phrase "Car Basis," includes all passenger and freight equipments of every character.

(b) One-half of all taxes levied and charged against the party of the first part on property jointly used under this agreement and hereinbefore described as property of the part of the first part, whether said taxes be state, county or municipal; whether general or special.

(c) The cost of agents, telegraph operators, clerks and all other expenses of every character at Robstown, Corpus Christi, and such other intermediate stations between Corpus Christi and Robstown as may hereafter be established, shall be paid by each party to this agreement upon the basis fixed in paragraph (a) of this Article.

Article 5

The expenses charged for maintenance of tracks, and other property under the provisions of this agreement, shall include the necessary repairs incident to the wear of usage and renewals of tracks, structures and other property, and also the expense of protecting trains at crossings as may be required by law or municipal ordinances, but no unusual or extraordinary expenses to be incurred as above the sum of $250.00 in any one month, without the consent of the party of the second part; except, in cases of emergency, such [fol. 202] as may be occasioned by cloud-burst, fire, etc., when the party of the first part shall restore the road to a safe condition and charge to party of the second part is

proportion, without waiting its express consent to make such repairs. An accurate account shall be kept by the party of the first part of all expenses of the maintenance of said tracks and property, and such accounts will be rendered in reasonable detail to the party of the second part, on or before the 15th day of each month.

Article 6

The party of the second part shall have equal rights with the party of the first part, to have and maintain a telegraph line upon the right of way of the party of the first part, the use of which is granted to the party of the second part, the party of the second part to have the said telegraph line, either by building an independent line upon said right of way, or by placing its own wires on the telegraph poles of the party of the first part; Provided, that the location of such wires, or of the new line, as the case may be, shall be approved by the party of the first part, and should the party of the second part elect to place its wires on the poles of the party of the first part, the said second party will pay for the maintenance of its wires, upon a basis of one-half the cost of said maintenance.

Article 7

For purposes of this agreement, the following named employees shall be deemed and considered joint employes, [fol. 203] for whose negligence both parties to this agreement, shall be jointly liable, except as hereinafter qualified, to-wit: Agents at Corpus Christi and Robstown, and their Clerks and assistants, by whatever name known or carried; Operators at Corpus Christi and Robstown, and all section foremen and men, bridge men, track walkers, etc., on the road between Robstown and Corpus Christi; hostlers and engine men at Corpus Christi, it being intended that all employes serving upon the line of the Texas Mexican Railway between Robstown and Corpus Christi, both points included, shall be deemed joint employes of both parties to this agreement.

(a) All damages to persons or to property of third persons, caused by the trains of either party to this agreement, whether by the negligence of the train crews or of the negligence of the joint employes, as specified, shall be

borne by the party whose train caused said damages. And, in the event either party is sued in the courts for damages account of injuries to persons or property, the party whose train or employes cause such damage, shall indemnify the other for all sums adjudged against it and pay same upon demand, it being understood that each party to this agreement will pay all sums account injuries to persons or property caused by their respective trains, notwithstanding such damages may be the direct and proximate result of the negligence of such employes, herein declared to be joint employes.

(b) All damages to persons or property caused by the negligence of the servants and employes of either party, [fol. 204] other than joint employes, as herein specified, shall be borne and paid by the party whose servants and employes caused such damage.

(c) All stock killed or injured by the trains of either party, shall be paid by the party whose train killed or injured such stock. And, in the event that the officers of the respective parties hereto shall be unable from Conductors', Engineers', and Section Foremen's report of stock injured or killed, to determine which parties train killed or injured such stock, then and in that event the parties hereto shall share such loss jointly.

(d) It is understood that each party to this agreement, shall be responsible for any and all damages to persons or property caused by their respective trains, whether caused by employes declared to be joint, or by any fault or negligence of the train dispatchers.

(e) It is expressly understood by the parties to this agreement that all damages sustained by either party to this agreement shall be borne and paid according to the true intent and meaning of this instrument, and each party hereto will indemnify and hold harmless the other party against payment of any loss occasioned by reason of its own negligence; and, should either party by judgment of the courts be compelled to pay any sum caused by the other, its officers, servants or employes, then such other party shall pay same upon bill rendered giving the facts.

(f) All damages incurred through the negligence of joint [fol. 205] employes, except as otherwise herein provided, shall be borne by the parties hereto equally.

Article 8

It is further agreed that the sum of $5,000.00, donated by the citizens of Corpus Christi, to the party of the second part for passenger station development at Corpus Christi, shall be used for passenger station development and that each party to this agreement shall be equally interested. If the said sum of $5,000.00 should prove insufficient to pay for such development, then such excess shall be borne by the parties hereto equally; Provided, that no such excess shall be contracted or incurred without the approval of both parties to this agreement.

It is also further agreed that a joint combination freight and passenger station, station house, etc., shall be constructed at Robstown of sufficient facility and capacity to accommodate the business, not to exceed $3,000.00, and to be borne by the parties hereto equally.

It is further agreed that the party of the first part shall have the right to take water for its locomotives, etc., from the well and tank of the party of the second part at Robstown at cost, plus 10%.

Article 9

Should any additional tracks, not referred to in Article 8 of this agreement, bridges, structures or improvements, be added in the future to the railway jointly used under this agreement to meet the joint needs of the parties hereto, [fol. 206] the second party shall pay to the first party 2½% interest per annum on the value of such additional tracks, bridges, structures or improvements; but, should the second party not be willing to make use of such additional tracks, structures or improvements, the question as to whether or not they shall be required to pay rental therefor, shall be submitted to arbitration.

It is also understood and agreed that no extraordinary outlay shall be made by the party of the first part in the replacement of existing tracks, structures, bridges or buildings of any kind, or for additions to the property, or for the construction of additional tracks or structures for which said first party may expect the said second party to pay increased rental, unless said second party shall have consented to such outlay.

It is also agreed that the party of the second part shall have a right to demand an increase of facilities, such as

additional sidings, passing tracks, structures, etc., deemed necessary to facilitate the prompt movement of trains of the party of the second part; and, in case such demand is not acceded to by the party of the first part, the question as to whether the party of the second part shall supply same, shall be settled by arbitration, the purpose being, that the facilities of the road shall be kept adequate for the business upon it.

Article 10

It is mutually agreed that should disagreement arise [fol. 207] between the parties hereto as to act, or omission to act under this agreement, or as to the meaning of any provision hereof, or liability, the same shall be submitted to arbitration. One arbitrator shall be appointed by the first party, one by the second party, and if these arbitrators cannot agree, they shall select a third like disinterested and competent party, and a decision of a majority shall be final and conclusive between the parties. In case either of the said parties shall fail to appoint an arbitrator as aforesaid, for a period of 20 days after written notice given by the other party to make such appointment, then and in that event, the arbitrator appointed by the party not in default, shall appoint another party of like experience and skill for the defaulting party. In either case, the two arbitrators appointed, shall select a third party and the three so chosen, shall hear and decide such differences, and their decision, or that of a majority of them—said decision to be in writing signed by the arbitrators making it—shall be final and conclusive upon all parties hereto, and each party to this agreement hereby covenants for itself, its successors and assigns; forthwith upon the rendering of any decision as aforesaid, to comply with and perform the requirements thereof, and further to pay any sum or sums of money that may be required to be paid, or to do any acts or acts required to be done by such decision or award, the expenses of such arbitration to be divided equally between the parties hereto.

[fol. 263] Article 11

It is agreed, that if the party of the second part shall default in making either or any of its payments herein provided for, and shall continue in such default for thirty days, or fail to keep and perform any of its other covenants

herein stipulated, then, and in such event, the party of the first part may at its option, terminate this agreement and withdraw all rights therein granted upon thirty days notice in writing to the party of the second part, or its successors under this contract, of its intentions to withdraw its rights as aforesaid."

Article 12

This contract shall take effect on the 1 day of November, 1904, and shall continue for the full term of Fifty (50) years from date, unless sooner terminated by the parties hereto, or by one or the other from some violation of its terms, conditions and limitations, and shall inure to the benefit of, and shall be binding upon the successors and assigns of either party hereto.

It is further agreed that this contract may be terminated without giving any reason therefor, by either party, upon giving twelve months notice of such intent to terminate the lease.

The parties to the above and foregoing agreement, mutually covenant and agree to observe their respective obligations imposed by this agreement, and the party of the second part accepts the conditions of said agreement, and [fol. 209] obligates and binds itself for the full period of this contract, to operate at least, one train each way daily over the line of the party of the first part, between Robstown and Corpus Christi.

In Testimony Whereof, The Texas Mexican Railway Company and the St. Louis, Brownsville & Mexico Railway Company, acting through and by their respective General Managers, have hereto caused to be executed in quadruplicate, this agreement.

The Texas Mexican Railway Company, by Frank Rice, Jr., Gen. Supt.

Attest: The Texas Mexican Ry., by J. E. Douglas, Secy.

St. Louis, Brownsville & Mexico Railway Company, by (Name illegible), Vice-Prest. & Gen. Mgr.

Attest: H. W. Adams, Secy. St. L. B. & M. Ry. Co.

Texas Mexican-St. Louis, Brownsville & Mexico Joint Trackage Contract.

Approved as to form: James B. Wells, General Attorney.

Approved as to form: Wm. W. Dowd, Genl. Atty.

10-1000

Endorsement: (3) 33 Contract Texas Mexican Ry. and St. L. B. M. Ry. Trackage Agreement.

(And attached to said pleading being the following exhibit in words and figures as follows, to-wit:)

[fol. 210] Supplemental Agreement Between the Texas Mexican Railway Company and St. Louis, Brownsville & Mexico Railway Company and Frank Andrews, its Receiver.

This Agreement made and entered into this 1st day of October, A. D. 1914, by and between the Texas Mexican Railway Company hereinafter called the "Texas Company," party of the first part; and Frank Andrews, Receiver of St. Louis, Brownsville & Mexico Railway Company, hereinafter called the "Receiver," party of the second part; and St. Louis, Brownsville & Mexico Railway Company, hereinafter called the "Brownsville Company," party of the third part, Witnesseth:

That Whereas, the Texas Company and the Brownsville Company have heretofore made and entered into a contract dated November 1, 1904, for the joint use of the facilities and line or railroad of the Texas Company extending from Robstown to Corpus Christi, in the State of Texas; and,

Whereas, the Receiver has confirmed said contract and continued to operate under and perform the same with the Texas Company, since his appointment as Receiver of the Brownsville Company; and,

Whereas, the parties desire to make certain changes in said contract which will be for the mutual benefit of all parties interested therein, which changes shall be in the nature of a Supplemental Agreement, supplementing and confirming the said former contract, except as changed herein:

Now, Therefore, the parties hereto do mutually and sepa-
[fol. 211] rately agree as follows:

1

The Texas Company does hereby grant to the other parties hereto for the period hereinafter specified and upon the terms and subject to the conditions and limitations h-rein

named, the right to operate its trains over the main line, side-tracks and passing tracks, and to use the various industry tracks jointly with the said Texas Company, from the center of the crossing of the lines of the Texas Company and the Brownsville Company, at Robstown to the western yard limits of the Texas Company at Robstown, being to a point one-thousand (1000) feet west of the west switch stand of the Texas Company at Robstown as now or hereafter located, together with all tracks and spurs in said yard limits, which grant shall be in addition to that given by the Texas Company in Article I of said former contract herein described, and the Receiver and the Brownsville Company do hereby grant to the Texas Company the right to use for the purpose of interchanging cars, taking water at the Brownsville Company's tank and turning engines and cars of the Texas Company, its two wye tracks at the station of Robstown, and the main track of the Brownsville Company between the crossing of the two main lines at Robstown, and Five Hundred (500) feet south of the wye track switches of the Brownsville Company, which tracks are to be maintained by the Receiver or the Brownsville Company at their sole expense and no rental charge [fol. 212] shall be made to the Texas Company, but the Texas Company shall have the right to use the same for the period hereinafter specified upon the terms, conditions and limitations herein set forth.

2

The maintenance of that part of the line of the Texas Company from the center of the crossing of the two main lines at Robstown to a point 2361 feet west thereof shall be included in the maintenance of the joint facilities and prorated between the Texas Company and the Brownsville Company on the basis provided in Article 4, subdivision —, of the original contract as hereinafter amended, it being understood that no additional shall be made to the valuation of the joint facilities on account of the value of that part of the main line of the Texas Company west of the crossing of the two main lines.

It is mutually agreed that Article 4 of said former contract be amended in the following respects, to-wit:

1st: That Subdivision (a) of Article 4 be changed to read as follows:

"(a). A certain proportion of the actual cost of maintenance of said main tracks, side-tracks, passing tracks, buildings, etc., of the party of the first part, between the points hereinbefore mentioned in Article I of this agreement, without any charge for superintendency, computed on what is known as a "car mileage basis," i. e., a sum which shall bear same proportion to the entire cost of [fol. 213] maintenance of said tracks, buildings, etc., as the mileage of all cars handled by the Receiver and the Brownsville Company between said points described in Article I hereof, shall bear to the total mileage of all cars moved over said line between said points by any persons or corporations whatsoever; and it is agreed that all freight cars, passenger cars and cabooses are to be counted as cars hereunder, and each engine and tender is to be counted as one car. Engines and cars used exclusively in the maintenance of the joint facilities are not to be counted.

2nd. That there be added to said Article 4 of said contract the following provisions, to-wit:

(d) Each party hereto will furnish its own printed blanks for use in joint stations or under this contract, and will make no bill against the other parties for same, but the Texas Company will furnish all staple stationery and station supplies except such items as are covered by printed blanks or forms furnished by either party, and the expense of such staple stationery and supplies shall be apportioned as provided in Subdivision (a) hereof.

(e) The Texas Company will add to the cost of material and supplies used in the maintenance or improvement of the joint track, as described in Paragraph I hereof, one-half the published tariff rate to cover the expense of handling from point of shipment on the Texas Company to point where unloaded on the joint facility, provided that the freight charges on cross ties will not be figured from a [fol. 214] point west of Banquette.

(f) On stationery supplied joint stations, as provided in Paragraph "d" of this article and on all materials and supplies for use in the maintenance or improvement of the joint facility which is handled through the storehouse of the Texas Company, the Texas Company will add ten per cent (10%) to the invoice value of such stationery or material and supplies to cover cost of handling. Material and supplies are not to include any heavy material, such as switch ties, bridge and building material, and rail.

4.

It is further agreed that the terms and provisions of the said contract of November 1, 1904 shall apply to this contract, and to the additional facilities described and referred to herein, insofar as such terms and provisions are not inconsistent with the terms and provisons of this Supplemental Agreement, and the same conditions and limitations as to use and occupancy as were imposed upon the Brownsville Company in said former contract as to the tracks and facilities of the Texas Company, be likewise imposed upon and are assumed by the Texas Company herein as to the tracks and facilities of the Brownsville Company, the use of which are granted herein to the Texas Company, insofar as the same is consistent with the provisions of this Supplemental Agreement.

5.

This Supplemental Agreement shall take effect as of [fol. 215] October 1, 1914, and shall be effective from that date provided that it shall be approved and ratified by the order and decree of the District Court of the United States for the Southern District of Texas, Houston Division, in the cause in which the Receiver has been appointed, and that the same shall continue in force and effect for the term of the original contract herein referred to, but it is further agreed that in the event of the termination of the Receivership of the Brownsville Company, this contract shall be wholly terminated as to the Receiver, but shall continue in force and effect between the Brownsville Company and the Texas Company in like manner as if no Receivership had intervened, it being understood that the Receiver and his successors as such, shall perform the operations hereunder during the period of the Receivership,

and that the Brownsville Company or its successors and assigns shall perform the provisions of the same after the termination of such Receivership.

6

It is further agreed that no provision hereof shall be construed as placing any personal obligation upon Frank Andrews, who executes the same solely in his capacity as Receiver and he shall not be personally bound thereby.

In Testimony Whereof, the parties have executed this instrument in triplicate on this 1st day of October, A. D. 1914.

The Texas Mexican Railway Company, by S. W. [fol. 16] DeWolf, Genl. Mgr. Frank Andrews, As Receiver of St. Louis, Brownsville & Mexico Railway Company.

Attest: ——— ———, Secretary.

St. Louis, Brownsville & Mexico Railway Company, by G. H. Weir, Vice-President.

Attest: W. H. Nance, Secretary.

Approved as to form.

———— ————, Attorneys for Texas Mexican Railway Company.

Andrews, Shulman, Burns & Hogue, Attorneys for St. Louis, Brownsville & Mexico Railway Company, and its Receiver.

Endorsement: The Texas Mexican Railway Company, With St. Louis, Brownsville & Mexico Railway Company and Frank Andrews, Receiver. Supplemental Agreement. to Cont =33.

Endorsement: No. 24588-C. In the ——— District Court, Nueces County, Texas. The Texas Mexican Railway Company vs. St. Louis, Brownsville & Mexico Railway Company, et al. Plaintiff's Original Petition. Filed May 25, 1942. Ben A. Ligon, Clerk District Court, Nueces County, Texas. By Oma Talbert, Deputy.

[fols. 217-229] Mr. Tarlton: And the Defendants Original Answer and the file mark.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 10-BEA," and the same being in words and figures as follows, to-wit:)

Plaintiff's exhibit No. 10 omitted. Printed side page 2 ante.

[fol. 230] Mr. Tarlton: Paragraph 4 of the admissions of the Defendants.

Mr. Crenshaw: We have some objections to these. We have no objection to that. I don't understand the purpose of it. We have some objections to the introduction of the petition and it seems like that is introducing a self-serving document. It is not evidence. It is merely allegations of the pleaders employed by the plaintiff and not proof of the fact. Anything they can get out of our Answer is all right, if they can show any materiality, and this Paragraph 4 I don't object to.

Mr. Tarlton: The purpose of the introduction of the [fol. 231] Petition is to show the date of the filing and the nature of the controversy alleged on the Defendants' Motion to Stay and Plea to Jurisdiction of this Court.

Mr. Crenshaw: We have no objections. (The said Paragraph 4 being by the Court Reporter marked, "Plaintiff Exhibit No. 11—BEA," and same being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT NO. 11

4. That H. R. Safford is the chief executive operating agent in Texas for (a) Missouri Pacific Railroad Company; (b) St. Louis, Brownsville & Mexico Railway Company; (c) San Antonio, Uvalde & Gulf Railroad Company; (d) Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company; (e) Guy A. Thompson, Trustee for The San Antonio, Uvalde & Gulf Railroad Company.

4. Defendants do not admit that H. R. Safford is the chief executive operating agent in Texas for the Missouri Pacific Railroad Company, but do admit that he is the chief operating official in Texas for Guy A. Thompson, as Trustee for The St. Louis, Brownsville & Mexico Railway Com-

pany and for the San Antonio, Uvalde and Gulf Railroad Company.

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas by Louise Eubank, Dy.

Mr. Tarlton: We offer now Paragraph 12 on page 4 of [fol. 232] the admissions of the Defendants.

Mr. Crenshaw: Yes.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 12—BEA," and being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 12

12. That on all freight traffic into and out of Corpus Christi via the Defendant The St. Louis, Brownsville & Mexico Railway Company moving over the rails of The San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi, the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, shares with Guy A. Thompson, Trustee for The San Antonio, Uvalde & Gulf Railroad Company, a division in freight revenue on such traffic.

12. Defendants admit that on all freight traffic into and out of Corpus Christi via the defendant, The St. Louis, Brownsville & Mexico Railway Company moving over the rails of the San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi, the defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, shares with Guy A. Thompson, Trustee for the San Antonio, Uvalde & Gulf Railroad Company, a division in freight revenue on such traffic.

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas by Louise Eubank, Dy.

[fol. 233] Mr. Tarlton: Paragraph 14 on page 5.

Mr. Crenshaw: That is all right. If the Court please, apparently they are going to delete a part of some paragraph. These admissions were made under the new rules

and in response to their demand and it seems to me they have no right to cut the string in two and introduce only what they want.

Mr. Dodson: We are not deleting any fact, but your conclusion.

Mr. Crenshaw: If they are going to start introducing fragmentary sections—the matter might be important, and I think if they are going to introduce a part of it they ought to introduce the whole thing.

Mr. Tarlton: I don't know any rule of law that we are bound by their admissions. I think the only way——

The Court: Overrule the objection.

Mr. Crenshaw: We except.

Mr. Tarlton: All we ask to delete is matter not responsive to the question and a conclusion of the attorney——

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 13—BEA," and the same being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 13

13. That neither the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Com- [fol. 234] pany, nor the Defendant The St. Louis, Brownsville & Mexico Railway Company pays to the Plaintiff any compensation on freight traffic moving into and outt of Corpus Christi via The St. Louis, Brownsville & Mexico Railway Company over the rails of The San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi.

13. Defendants deny that neither Guy A. Thompson, Trustee of The St. Louis, Brownsville & Mexico Railway Company, nor defendant, The St. Louis, Brownsville & Mexico Railway Company, pays the plaintiff any compensation on freight traffic moying into and out of Corpus Christi via The St. Louis, Brownsville & Mexico Railway over the rails of The San Antonio, Uvalde & Gulf Railroad Company between Odem and Corpus Christi.

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas by Louise Eubank, Dy.

Mr. Tarlton: We want the record—we offer demand No. 15.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 14—BEA," and the same being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 14

15. That since November 1, 1941, train operatives of the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, go upon tracks of [fol. 235] Plaintiff with locomotives and trains at will without regard for the orders of Plaintiff and its agents.

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas, by Louis Eubank, Dy.

Mr. Tarlton: And we now offer the following answer. Withdraw the offer of Interrogatory 15 and offering 14. Read the interrogatory 14 and in connection with that we offer this portion of the admission No. 14.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 15—BEA," and the same being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 15

14. That the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, thru his operating agents, had daily since November 1, 1941, directed train operatives to go upon the tracks, switches and terminals of Plaintiff in Corpus Christi and upon the tracks of Plaintiff from Corpus Christi to Robstown under claim of right evidenced by the contract between The St. Louis, Brownsville & Mexico Railway Company and The Texas Mexican Railway Company dated November 1, 1904, and the written supplements and amendments thereto.

14. Defendants admit that defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Rail-[fol. 236] way Company, through his operating agents, has daily since November 1, 1941, directed train operatives to go upon that portion of plaintiff's track necessary for the

operation of the trains of said defendant between Corpus Christi and Robstown.

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas by Louise Eubank, Dy.

Mr. Tarlton: We don't offer the balance of the admission because it is a legal conclusion of the party making the admissions, and not responsive to the question asked.

Mr. Tarlton: We offer interrogatory No. 16 of the admissions and the answer.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 16—BEA," and the same being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT NO. 16

16. That Exhibit #1 is a true copy of an Application which Plaintiff prepared and tendered to the Interstate Commerce Commission for filing.

16. On information and belief, defendants admit that Exhibit #1 attached to plaintiff's demand is a true copy of an application which plaintiff prepared and tendered to the [fol. 237] Interstate Commerce Commission for filing.

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas by Louise Eubank, Dy.

Mr. Tarlton: The next is demand No. 17 and the answer.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 17—BEA," and being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT NO. 17

17. That copies of said Application referred to in Paragraph 16 next preceding were furnished attorneys for Defendant The St. Louis, Brownsville & Mexico Railway Company and Mr. H. R. Safford, Senior Executive Assistant, Union Station, Houston, Texas, and Mr. H. H. Larrimore, Interstate Commerce Counsel, Missouri Pacific Building, St. Louis, Missouri, in August 1941.

17. Defendants admit that copies of said application referred to in Paragraph 16 next preceding were furnished attorneys for defendant, The St. Louis, Brownsville & Mexico Railway Company, and Mr. H. R. Safford, Senior Executive Assistant, Union Station, Houston, Texas, and Mr. H. H. Larimore, Interstate Commerce Counsel, Missouri Pacific Building, St. Louis, Missouri, in August 1941.

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas By Louise Eubank, Dy.

[fol. 238] Mr. Tarlton: We offer admission No. 19 on page 6.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 18—BEA," and being in words and figures as follows:)

PLAINTIFF'S EXHIBIT, No. 18

19. Defendants admit that Exhibit #2 was written by the Secretary of the Interstate Commerce Commission in response to the tender by plaintiff of the application (Exhibit #1), and a copy of said letter was sent to Mr. H. R. Safford, St. Louis, Brownsville & Mexico Railway Company, Houston, Texas.

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas By Louise Eubank, Dy.

Mr. Tarlton: Plaintiff next offers admission No. 21 and the interrogatory in connection therewith.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 19—BEA," and being in words and figures as follows:)

PLAINTIFF'S EXHIBIT No. 19

21. That Mr. H. R. Safford, Senior Executive Assistant, Missouri Pacific Lines, Houston, Texas, was notified by M. M. Leyendecker, Vice-President and General Manager for Plaintiff, on November 3, 1941, to the effect that having received no definite statement as to what Mr. Safford pro-

posed to do with respect to the notice of cancellation of the [fol. 239] contract of November 1, 1904, and supplements thereto concerning the use of the rails of tracks of Plaintiff in its yard at Corpus Christi and between Corpus Christi and Robstown, and he still operating on the rails of Plaintiff, further continuation thereof would be at a charge of $500.00 a day for the use of said facilities.

21. Defendants admit that Mr. H. R. Safford, Senior Executive Assistant, Missouri Pacific Lines, Houston, Texas, received from Mr. M. M. Leyendecker, Vice-President and General Manager for plaintiff, a letter dated November 5, 1941, reading as follows:

"DEAR MR. SAFFORD:

In a letter dated October 28, 1940, I notified you, Mr. H. M. Lull of the T. & N. O. Ry. Company and Mr. A. D. Mims of the San Antonio and Arkansas Pass Ry. Company of this carrier's intention to cancel and terminate that certain contract dated November 1, 1904, and all supplemental contracts and memorandums of agreement thereto, concerning their use of rails or tracks of The Texas-Mexican Railway Company in its yard at Corpus Christi, Texas, and between Corpus Christi and Robstown, Texas, said cancellation to be effective November 1, 1941.

We have not to this date received from you any definit statement as to what you propose to do and we find you still operating on our rails. As the cancellation became effective November 1, 1941, and there [fol. 240] is a daily accurring liability by reason of your occupancy of these rails, this is to advise you that effective this date there will be a daily charge of $500.00 a day for the use by you of these facilities. I desire to further advise you the other interested parties mentioned in the first paragraph of this letter have notified us that they will waive any further notice and join us in application to the I. C. C. for approval of the cancellation of the contract. We trust you will be willing to do likewise."

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas, by Louise Eubank, Dy.

Mr. Tarlton: We next offer in evidence the interrogatory and admission No. 24, page 6.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 20—BEA," and being in words and figures as follows:)

PLAINTIFF'S EXHIBIT No. 20.

24. That Mr. Safford in writing on November 29, 1941, addressed to the Vice-President and General Manager of Plaintiff, acknowledged receipt of the notice November 5, 1941, referred to in Paragraph 21 above, and stated with respect to the $500.00 per day charge for use of facilities: "We are not agreeable to accepting a daily charge of $500.00 per day for use of The Texas Mexican facilities, or any [fol. 241] other charge except such as may be in accordance with the contract of November 1, 1904, as supplemented or amended to date."

24. Defendants admit that Mr. Safford in writing on November 29, 1941, addressed to the Vice-President and General Manager of plaintiff, acknowledged receipt of the notice of November 5, 1941, referred to in Paragraph 21 above, and stated with respect to the $500.00 per day charge for use of facilities: "We are not agreeable to accepting a daily charge of $500.00 per day for use of The Texas Mexican facilities, or any other charge except such as may be in accordance with the contract of November 1, 1904, as supplemented or amended to date."

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas By Louise Eubank, Dy.

Mr. Tarlton: We next offer interrogatory and answer No. 25 of the admissions of the Defendants.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 21—BEA," and being in words and figures as follows:)

PLAINTIFF'S EXHIBIT No. 21

25. That the Defendants continue and intend to continue the use of the facilities described in said contract of November 1, 1904, as supplemented and amended.

25. Defendants admit that defendant, Guy A. Thompson, intends to continue the use of the facilities described in

[fol. 242] a contract between plaintiff and The St. Louis, Brownsville & Mexico Railway Company, date November 1, 1904, as supplemented and amended, so long as may be required by law.

Endorsement: Filed in evidence by Plaintiff 8-27-'43. Ben A. Ligon, District Clerk, Nueces Co., Texas By Louise Eubank, Dy.

Mr. Tarlton: We next offer interrogatory No. 26 and answer on page 8 of Defendants admissions.

(The same being by the Court Reporter marked "Plaintiff Exhibit No. 22—BEA," and being in words and figures as follows:)

PLAINTIFF'S EXHIBIT No. 22

26. That Defendants do not intend to make any application to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity permitting the *the* Defendant or either of them to abandon operations on the lines of Plaintiff by reason of its notice of cancellation of the contract of November 1, 1904, together with supplements and amendments thereto.

26. Defendants admit that defendants do not at present intend to make any application to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity permitting the defendants or either of them to abandon operations on the lines of plaintiff by reason of its notice of cancellation of the contract of November 1, 1904, together with supplements and amendments thereto.

[fol. 243] Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas By Louise Eubank, Dy.

Mr. Tarlton: We next offer in evidence, Your Honor, the contract and supplement and letter accompanying the execution of the contract by The St. Louis, Brownsville & Mexico Railway Company of date August 29, 1904.

Mr. Crenshaw: If the Court please, the contract shows to have been dated November 1, 1904. They seek to introduce a letter addressed by someone representing them, by Jeff N. Miller, for the St. Louis, Brownsville & Mexico

Railway Company, addressed to Mr. Thomas W. Dodd, and that letter is dated August 29, 1904, and complained of the contract as prepared at that time, August 29, 1904, certain provisions in it. The evidence will show that the objections contained in his letter were met to some extent, or at any rate later during the month of September or October the parties got together and prepared the contract that is the basis on which this suit is brought. Therefore, everything that was in this letter was merged into the contract, and the letter, therefore, is of no material significance; just as well introduce a lot of conversation and argument, Your Honor, before we agreed on the judgment that was to be entered in a case. The letter to my mind is objectionable. It has no bearing on the issue. To my mind it has no [fol. 244] value in the case. Any changes or objections or suggestions were merged into the contract as finally executed, and therefore, it seems like——

Mr. Tarlton: The contract in the case, if Your Honor please, has in paragraph 12 the provision that the term of the contract shall be for fifty years subject to termination without reason by either party at the end of five years.

Mr. Crenshaw: Is that the contract?

Mr. Tarlton: No; it is further agreed that this contract may be terminated by either party without giving any reason. The letter offered in evidence is offered for the purpose of showing the construction of the parties at the time of entering into the contract, in negociating for the contract, put around that clause. We think it is material to the reason why the period of twelve months was fixed as a basis for termination.

Mr. Crenshaw: There is no difference between us on that.

The Court: I see no materiality of the letter. Sustain the objection.

(The said contract and supplement thereto were by the Court Reporter marked, "Plaintiff Exhibit No. 23—BEA," but the same are not copied here for the reason that they are identical to the exhibits attached to Plaintiff's Original Petition appearing herein as Plaintiff Exhibit No. 9.)

Mr. Tarlton: We except to the ruling of the Court. We [fol. 245] further tender it as explaining the action of the parties in providing for termination on twelve months notice.

Mr. Crenshaw: We still object, Your Honor.
The Court: Objection sustained.

(The same being by the Court Reporter marked, "Plaintiff Exhibit No. 24—For Identification," and the same being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 24

Kingsville, Texas, August 29th, 1904.

Mr. Thos. W. Dodd, Vice-President, Texas Mexican R'y, Laredo, Texas

DEAR SIR:

I have your favor of the 26th transmitting contract in duplicate for joint use of track between Robstown and Corpus Christi. Since draft of contract was submitted to me in July, I notice a change as to period of lease that will affect our donations at Corpus Christi. The term of lease as agreed upon between Mr. Clark and ourselves was for fifty years and the draft of contract as prepared was for the same period; but the agreement submitted with your letter of the 26th has reduced this to a term of five years. Permit me to suggest that we adhere to the original agreement for the full period of fifty years with clause providing that the contract can be terminated by either party upon twelve months written notice or by one or the other of some [fol. 246] violation of its terms, conditions and limitations. You understand that we are to collect $10,000.00 from the Donation Committee at Corpus Christi, $5,000.00 of which is to be used for terminals and improvements; in addition to this, we participating in the expense on our basis of track repairs, which are now underway, for the entire distance between Robertown and Corpus Christi, and if cancelation clause of twelve months is inserted there should be no objections to the full period of fifty years as agreed upon. You understand, of course, a sixty days notice of cancelation would not give us sufficient time to construct an independent line between the two points.

Trusting that you can straighten this matter out at your very earliest convenience in order that contract can be

properly executed and approved by the various Boards, I am,

Very truly yours, Jeff N. Miller.

Enc

Endorsement: Filed in evidence by Plaintiff 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas By Louise Eubank, Dy.

(The above exhibit appears on letterhead of St. Louis, Brownsville & Mexico Railway Company, office of Jeff N. Miller, Vice-Pres't. and Gen. Manager.)

Mr. Tarlton: And in connection with the tender we want to show the letter is signed by the Vice-President and General Manager of the railroad, the same party that [fol. 247] signed the contract.

Mr. Crenshaw: We want to add the point whatever construction it was, Jeff N. Miller, whatever construction he placed on that contract in 1904, would not be binding on Guy A. Thompson, Trustee in Bankruptcy; that contract has to be construed by this Court, if the Court retains jurisdiction, and the Court would not be bound by the construction of somebody who signed it years ago.

Mr. Tarlton: We certainly think the Court is bound by the construction of the parties at the time and simultaneously with the execution of the contract applied to it. We have tendered the letter showing the construction of the Vice-President and General Manager of the company, under which contract they claim the right, the party who executed the contract made. Does the Court hold to his ruling?

The Court: Yes.

Mr. Tarlton: We renew our exception.

Mr. Tarlton: We next offer in evidence the Plaintiff's Amended Original Petition.

Mr. Crenshaw: We have the same objections.

Mr. Tarlton: Filed April 9, 1943.

Mr. Crenshaw: Mr. Tarlton, is it understood it is offered merely to show the filing and nature and character [fols. 248-265] of the suit?

Mr. Tarlton: That is it.

Mr. Crenshaw: With that understanding we have no objection.

(The same being by the Court Reporter marked, "Plaintiff. Exhibit No. 24-A—BEA," and being in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 4-A2 Omitted. Printed side page 44 ante.

[fol. 266] Mr. Tarlton: We offer in evidence on their failure to file in due order the docket entries made by the Court, including entry granting leave to the Defendants to file an Amended Answer.

(The same being as follows, to-wit:)

PLAINTIFF'S EXHIBIT IN EVIDENCE

8/3/42 Continued without prejudice to all pleadings
10/5/42 Set for Oct. 19th
2/1/43 Set for March 22
[fol. 267] 3/31/43 Transferred to 117th Dist. Court
4/1/43 Re-transferred to 94th Dist. Court
4/5/43 Set for April 19, 1943
4/9/43 Defs. granted leave to file third ammended answer
6/7/43 Set for June 14th
8/2/43 Set for Aug. 16th.

[fol. 268] R. R. FENNER, called as a witness by the Plaintiff, first having been duly sworn, testified as follows:

Direct examination.

By Mr. Tarlton:

Q. What is your name, please?
A. R. R. Fenner.
Q. What is your position or employment with the Texas Mexican Railway Company?
A. General manager.
Q. General manager?
A. Yes, sir.
Q. How long have you occupied that position?
A. About fourteen months.
Q. Will you please state, Mr. Fenner, whether or not the Texas Mexican Railway Company has accepted any pay-

ment from the Guy A. Thompson, Trustee, or St. Louis, Brownsville and Mexican Railway Company in the use of the track for the use of the trackage between Robstown and Corpus Christi since the date of the cancellation, November, 1941?

A. No, sir, we haven't received no payment.

Q. Do you mean by that you have received no payment for the use of this road?

A. No, sir, none whatever.

Q. Have you had any recent contact with the Corpus— [fol. 269] rather with the St. Louis, Brownsville and Mexico Railway Company or Guy A. Thompson, Trustee, with reference to whether or not you would recognize the existence of this contract?

A. No, sir, I have had no.

Q. You have had none?

A. No, sir.

Mr. Tarlton: That is all.

Mr. Crenshaw: Is it——

Mr. Tarlton: Just a moment.

Direct examination continued.

By Mr. Tarlton:

Q. I will ask you to look at that and state whether or not you dispatched that letter to the——

A. Yes, sir, I wrote the letter to Mr. Neff.

Q. Did you understand my question when I asked you if you had had any correspondence with reference to the subject of that letter refusing to recognize the existence of the contract?

A. Yes, sir.

Q. Is this the letter that you wrote to them?

A. Yes, sir.

Q. You signed that letter?

A. Yes, sir.

Q. Addressed to the parties named?

A. Yes, sir, Mr. Neff.

Q. Mr. P. J. Neff?

A. Yes, sir.

[fol. 270] Mr. Tarlton: Have you the original of that letter?

Mr. Crenshaw: That letter is dated August 2, 1943, is it not, Mr. Fenner?

A. Yes, sir.

Q. Mr. Crenshaw: That is just about two weeks ago?

A. Yes, sir, about that long.

Mr. Crenshaw: Are you planning to offer that in evidence?

Mr. Tarlton: Yes, sir. We do offer it.

Mr. Crenshaw: We object to that. It is a letter addressed by Mr. Fenner as general manager to P. J. Neff, the chief operating officer of the Trustee for the St. Louis, Brownsville and Mexico Railway Company, announcing Mr. Fenner's construction of the status of the parties and their relationship and whether there is a contract and a conclusion of law so far as it has any bearing on the case, offering some advise to Mr. Neff to familiarize himself with the facts, and that part of the letter which attempts to state whether or not they consider a contract in force or whether or not they consider it not in force are pure conclusions of law, and one of the most important questions of law to be determined by the Court, and we think it is not admissible and not proper for the operating official to attempt to give a legal construction of the present situation for the benefit [fol. 271] of the Court. The Court doesn't need any assistance.

Mr. Tarlton: We think certainly, Your Honor, the general manager can testify he directed a letter stating his conclusion that the contract was no longer in effect; the reactions of our company's attitude can only be expressed through this agent's action.

Mr. Crenshaw: That letter was received exactly two weeks ago, long after this suit was filed, long after every question in this case had been more or less presented as far as the parties were concerned. For Mr. Fenner to come along now, a year or so after the case was filed, and construe the situation it seems to me to violate the rules of evidence.

The Court: Objection overruled.

Mr. Crenshaw: Note our exception.

Mr. Tarlton: That is all.

(The said letter was by the Court Reporter marked, "Plaintiff Exhibit No. 25-BEA," but the same is not copied into this record for the reason that the said exhibit does not appear in the file of exhibits in this case.)

Cross-examination.

By Mr. Crenshaw:

Q. Are you familiar with the contract, Mr. Fenner?

A. Reasonably so. I have read it.

Q. It provides for payment by the St. Louis, Brownsville [fol. 272] and Mexico Railway Company, or its Trustee, of one-half of the ad valorum taxes each year?

A. I couldn't say. I am not familiar——

Mr. Tarlton: We object to payment by the Trustee. I think that is in contradiction of the contract itself. I don't think any provision for the railroad——

Mr. Crenshaw: The Trustee is operating the railroad. Change it to railroad, whether it provides for payment by the St. Louis, Brownsville and Mexico Railway Company of half of the taxes each year on bill submitted by The Texas Mexican Railway Company to the St. Louis, Brownsville and Mexico Railway Company?

A. Yes, sir.

Mr. Tarlton: The contract is the best evidence.

Mr. Crenshaw: All right.

Mr. Tarlton: It has been offered in evidence.

Mr. Crenshaw: It has been offered in evidence if I can locate it.

Q. Now, I had you a photostatic copy of the contract, Mr. Fenner, and ask you to look at section B of Article 4, which is this section (Indicating)?

A. Yes.

Q. Doesn't that provide for the payment of half the taxes each year?

A. Yes, sir, that is what it says.

Q. Now, in connection with the agreement, section B of [fol. 273] Article 4, that calls upon the St. Louis, Brownsville and Mexico Railway Company to pay half of the taxes (Reading the section). Now, isn't it a fact that each year, down to and including the year 1942, the Trustee of the St. Louis, Brownsville and Mexico Railway Company has paid to your company its one-half of the advalorum taxes in accordance with the terms of this agreement?

A. I think it was paid up to the time of the cancellation of the contract.

Q. Isn't it a fact a short time ago a voucher was sent to the auditor of your company in payment of half of the 1942 taxes?

A. I think that was returned, if I remember right.

Q. Would you know more about that or would Mr. Winch, your auditor?

A. The auditor would know more about it.

Q. You say for ten months of 1941 the taxes weren't paid?

A. I really couldn't say on that.

Q. Well, I don't want to press you if you don't remember it. Now, since the notice of cancellation is it your information that the Texas Mexican Railway Company has not submitted any bills to the St. Louis, Brownsville and Mexico Railway Company?

A. Yes, sir, we haven't submitted any.

Q. It is also your information that without such bills the St. Louis, Brownsville and Mexico Railway Company could not pay you any rental because they wouldn't know what [fol. 274] amount to pay, isn't that right?

A. Well, I don't know how to answer that; the contract was cancelled as set out in the suit there.

Q. And you never sent them any more bills?

A. No, sir.

Q. Now, the contract provides for payment by the St. Louis, Brownsville and Mexico Railway Company of a proportion of the cost of maintenance of the Texas Mexican Railway Company properties between Robstown and Corpus Christi, doesn't it?

A. When it was in force.

Q. I am not asking you anything except what the contract calls for?

A. Yes, sir.

Q. I am not trying to take advantage of you in any way. The cost of maintenance, repair to track, upkeep to track and buildings and structures, that was all done by the Texas Mexican Railway Company when the contract was in force?

A. Yes, sir.

Q. The St. Louis, Brownsville and Mexico Railway Company section hands didn't go over there and repair Texas Mexican Railway Company track?

A. No, sir.

Q. It was done by your employees?

A. Yes, sir.

Q. Then the contract, when it was originally drawn, also provided for the payment of the cost of agents, telegraph [fol. 275] operators, clerks, and all other expenses of every character at Robstown, Corpus Christi, and such other intermediate stations between Corpus Christi and Robstown as may hereafter be established?

A. Yes, sir.

Q. Those two items, the maintenance cost and salary of agents and such was on a basis determined by the proportion of Texas Mexican cars operated over that track and the St. Louis, Brownsville and Mexico cars operated over that track?

A. Yes, sir.

Q. Which company kept the wheel reports and wheel accounts so as to know how many cars of each company moved over that line?

A. We furnished duplicate copies to the St. Louis, Brownsville and Mexico Railway Company.

Q. Did the Texas Mexican Railway Company keep that record?

A. Yes, sir, we kept a complete copy.

Q. Kept it and furnished it to the St. Louis, Brownsville and Mexico Railway Company?

A. Yes, sir.

Q. Do you know when was the last time it was furnished?

A. No, sir; I couldn't say off hand.

Q. Do you know that when the contract was in force the Texas Mexican Railway Company from month to month submitted bills to the St. Louis, Brownsville and Mexico Railway Company?

A. Yes, sir.

Q. So as to show the amount the St. Louis, Brownsville [fol. 276] and Mexico Railway Company was due?

A. Yes, sir.

Q. It is a fact, is it not, that since your company sent the notice of cancellation of the contract now more bills have been submitted?

A. That is right.

Q. Unless it would be a bill for a portion of the year's taxes?

A. We haven't sent any bills I know of.

Q. You haven't sent any bills since November 1, 1941?

A. No, sir.

Q. Now, did you receive a letter from P. J. Neff, in reply to the letter you wrote him?

A. I don't know that it was exactly a reply. I received one letter after that from him.

By Mr. Lockett:

Q. Mr. Fenner, specifically do you have any knowledge of receiving a letter from Mr. Neff, addressed to you at Laredo, Texas, in your capacity as general manager, dated August 4, 1943?

A. I couldn't say off hand.

Q. Replying to yours of August 2?

A. I couldn't say off hand. Probably have it in the file.

Q. You have brought your file containing yours of August 2, could you determine whether you received a letter——

A. That is Mr. Dodson's letter. I don't have my file.

[fol. 277] Q. Would you say you didn't receive such a letter?

A. No, I wouldn't say I didn't receive it.

Q. I will ask you if you can identify this letter?

A. Yes, I received this letter.

Q. You say you received the letter which you have just read?

A. Yes, sir.

Mr. Lockett: That letter is dated August 4, 1943, addressed to Mr. R. R. Fenner by Mr. P. J. Neff and reads as follows:

Mr. Tarlton: Will you let us see it?

Mr. Lockett: It is a copy of a letter he says he received.

(The same being by the Court Reporter marked, "Defendants Exhibit No. 26—BEA," and being in words and figures as follows, to-wit:)

DEFENDANTS' EXHIBIT No. 26

Copy

August 4, 1943.

510.8

DEAR MR. FENNER:

This will acknowledge your letter of August 2nd in connection with my letter of July 24th to Mr. Morrison concerning switching of outbound cars for our line from team tracks and industries at Corpus Christi.

I am quite aware that your company does not recognize the 1904 agreement as being in force at this time and I was thoroughly familiar with that situation in writing my let-
[fol. 278] ter of July 24th, but it was my purpose to call your attention to the fact that should you be in error in that position, you are creating a possible liability for yourself by not furnishing us the bills on outbound cars from team tracks and industries on your line so that we could handle them in the ordinary course of our business with our own crews. Should you be in error in your conclusions with respect to the contract and our crews should make a later claim that they were entitled to the work performed by your crews in moving these cars, then we would be forced to pass such claim on to you for settlement.

This, of course, is a matter for you to determine and it was only with the view of giving you a friendly suggestion in the matter that I wrote at all. If you want to run the risk, it is, of course, all right with us.

Yours very truly, (S.) P. J. Neff.

Mr. R. R. Genner, Gen. Mgr., Texas Mexican Ry. Co.,
Laredo, Texas.
cc Mr. R. W. Morrison.

Endorsement: Filed in evidence by Defendant 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas, by Louise Eubank, Dy.

[fol. 279] Redirect examination.

By Mr. Tarlton:

Q. Mr. Fenner, isn't it a fact that as general manager of the railroad you instructed your auditor not to receive any payments under this contract at all subsequent to the time of its termination?

A. Yes, sir.

Q. Or render any bills?

A. Yes, sir.

Q. If any money was received in payments of taxes or anything it would be in violation of your authorization?

A. That is right.

Q. Isn't it a fact the damage to a track is largely occasioned by the operation of trains over tracks?

A. Oh, yes.

Q. In the operation of your Texas Mexican trains they are operated by diesel power, aren't they?

A. Yes, sir.

Q. The Missouri Pacific trains, are they lighter or heavier than yours?

A. They are a good deal heavier.

Q. Does that operation result in a larger damage to your property than the operation of your trains?

A. Yes, sir.

Mr. Crenshaw: I think we are going into the merits of the case.

[fol. 280] Mr. Tarlton: I think, Your Honor,——

The Court: Objection overruled.

Mr. Crenshaw: We think further they have a witness that doesn't need leading.

Mr. Tarlton: That is all we care to ask at this time. We think the testimony is valid to the question here.

The Court: I understand.

Recross-examination.

By Mr. Lockett:

Q. Were you here in 1904, Mr. Fenner?

A. No, sir.

Q. Where were you then?

A. I was in Houston, I believe.

Q. Not with the Texas Mexican Railway Company?

A. No, sir.

Q. With some other railroad. Do you know from inspection of records or any other source the character of track the Texas Mexican Railway Company had between Corpus Christi and Robstown in 1904, at the time the contract was made?

A. No, sir; I have no idea.

Q. Do you know from your own knowledge or from looking through records the improvements demanded and new operations and heavier rails put down since 1904?

A. No, I couldn't say.

[fol. 281] Q. The track does show that there has been a good deal of improvement on it?

A. Necessarily from time to time on every railroad to keep on operating.

Q. You have been with them around fourteen months?

A. No, sir. I have been general manager fourteen months.

Q. How long have you been with the Texas Mexican Railway Company?

A. Since 1930.

Q. Now, since 1930, do you know whether any expenditures have been made looking towards the strengthening of the track or not?

A. We have laid eight miles of 75 pound steel since then.

Q. What did you have before then?

A. I believe it was 65, but I am not positive.

Q. The line from Robstown to Corpus Christi is a heavier, stronger line than your line from Robstown west towards Laredo, is it not?

A. Not all together, no, sir. The best track is west of Robstown.

Q. The best track is west of Robstown?

A. Yes, sir.

Q. Is that because of the character of the soil it is laid on?

A. It is just not pounding it with heavy power in my idea is the big cause of it.

Q. The weight of the rails is heavier west of Robstown? [fol. 282] A. No, sir; same weight.

Q. Same weight?

A. Yes, sir.

Mr. Crenshaw: That is all.

Mr. Tarlton: That is all.

Mr. Crenshaw: If the Court please, we would like to offer in evidence the balance of admission 14. Plaintiff offered a portion of it.

Mr. Tarlton: We object to that, Your Honor, on the ground it is a mere conclusion.

The Court: Better let me see it.

Mr. Crenshaw: A portion of that was offered. The entire admission is (Reading the admission).

Mr. Tarlton: We object to——

Mr. Crenshaw: Let me get my reason in, in order that the Court may understand our position in offering the complete paragraph of the admission. It is this: They are charging that since November 1, 1941, we are not on their property, we are not sharing their properties with them under a claim of a contract, but that we are naked

trespassers; we are trespassers there without any lawful right. Now, in demanding of us we admit we go on their tracks. Judge, we state, "Yes, we go on your tracks." Had we stopped there and said nothing further we might [fol. 283] have laid ourselves open to the charge that is made in their pleadings, but we say in this admission, we go on those tracks, and we state we go on there because nearly forty years ago you gave us a contract, and our contention is that until you make it possible for us to terminate the contract and get off your track and the only — you can make it lawful for us to do that is to obtain the certificate of public convenience and necessity required by the Transportation Act, and until you do that and give us the notice we are still on there; the contract is still in force and we have as much right there as we ever had, and gentlemen, we are there by virtue of the contract alone.

Mr. Tarlton: Now, if Your Honor please, our contention is that that it is testified by the plaintiffs that these parties are using thise road not in accordeance with the terms of the contract and using it in violation of the provision which expressly provided for its termination upon one years notice. They are not undertaking to claim a right to stay there. We say that portion of their admission represents a conclusion, a conclusion that is the issue that this Court is to determine. He says we can't put them off the track. If we can't put them off it but emphasizes their trespass. They are the only authority that can ask the Interstate Commerce Commission for leave to abandon, and this suit is one in which we seek and equitable compensation for use of our property, and if is not correct for them to come here [fol. 284] and say, "We can offer in evidence our conclusions that in accordance with the terms of this contract we use and occupy the property," is to permit them to testify to their conclusion. They ask the Court to accept a fact admission made by them as a conclusion. We object to it and insist it should be excluded on that ground.

The Court: Objection sustained.

Mr. Crenshaw: Note our exception, if the Court please.

Mr. Crenshaw: Defendants offer in evidence interrogatory No. 15 in plaintiff demands of defendants for admissions of facts, and our answer in paragraph 15. (The same being in words and figures as follows, to-wit:)

DEFENDANTS' EXHIBIT IN EVIDENCE

15. That since November 1, 1941, train operatives of the Defendant Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, go upon tracks of Plaintiff with locomotives and trains at will without regard for the orders of Plaintiff and its agents.

15. Defendants deny that since November 1, 1941, train operatives of the defendant, Guy A. Thompson, Trustee for The St. Louis, Brownsville & Mexico Railway Company, go upon tracks of plaintiff with locomotives and trains at will without regard for the orders of plaintiff and its agents. [fol. 285] Mr. Crenshaw: In the light of that we re-offer paragraph 14 offered a while ago.

Mr. Tarlton: We urge our objection.

The Court: Sustained.

Mr. Crenshaw: If the Court please, the plaintiff offered in evidence certain paragraphs in reference to exhibit 1 attached to their demands for admissions and we now offer in evidence exhibit 1 for the purpose of showing to the Court that it is not an application made by the Texas Mexican Railway Company to the Interstate Commerce Commission for a certificate of public convenience and necessity no longer requiring operation by the Trustee of the St. Louis, Brownsville and Mexico Railway Company over the track in question, but that this application was an application presented to the Interstate Commerce Commission asking for authority to cancel the trackage agreement, and we also offer in evidence the letter from the Secretary of the Interstate Commerce Commission to the general counsel of the plaintiff, Mr. J. D. Dodson, returning it and advising that the Interstate Commerce Commission did not have authority or jurisdiction of an application to cancel a traffic contract.

Mr. Tarlton: Those applications are in evidence. We offered them. We have no objection to them being presented to the Court. As to what they are, the contents is for the Court to determine, and we object to counsel stating it as evidence.

[fol. 286] (The said Application being by the Court Reporter marked, "Defendant Exhibit No. 27—BEA," and the Letter being marked "Defendant Exhibit No. 28—BEA,"

and the said exhibits being respectively, in words and figures as follows, to wit:)

DEFENDANTS EXHIBIT No. 27

Before the Interstate Commerce Commission

Finance Docket No. —

In Re: Application of the Texas Mexican Railway Company for Authority to Cancel Trackage Agreements with the St. Louis, Brownsville & Mexico Railway Company

Application

J. D. Dodson, General Counsel, 1822 Smith-Young Tower, San Antonio, Texas.
M. M. Leyendecker, Vice-President & Gen. Mgr., Texas Mexican Railway Co., Laredo, Texas.

Before the Interstate Commerce Commission

Finance Docket No. —

In Re: Application of the Texas Mexican Railway Company for Authority to Cancel Trackage Agreements with the St. Louis, Brownsville & Mexico Railway Company.

Application

[fol. 287] To the Honorable Interstate Commerce Commission:

The Texas Mexican Railway Company, with leave, hereby tenders for filing its Original Application under Sections 18 and 21, inclusive, Section 1, of the Interstate Commerce Act, for a Certificate of Public Convenience and Necessity to terminate one certain trackage agreement entered into between Applicant and The St. Louis, Brownsville & Mexico Railway Company, November 1, 1904, and one certain supplement thereto entered into October 1, 1914, governing trackage rights of said The St. Louis, Brownsville & Mexico Railway Company on and over tracks of Applicant from Corpus Christi, Texas, to Robstown, Texas, and in support of said Application The Texas Mexican Railway

Company, Applicant, respectfully represents to the Commission:

A

The exact corporate name of Applicant is "The Texas Mexican Railway Company."

B

Applicant is a carrier by railroad and is subject to the Interstate Commerce Act. The St. Louis, Brownsville & Mexico Railway Company is a carrier by railroad organized under the laws of Texas, and owns and operates a line of railway in Texas, which said line of railway is now operated by Guy A. Thompson, Trustee, whose post office address is St. Louis, Missouri.

C

H. R. Safford, whose post office address is Houston, [fol. 288] Texas, now is and for more than twelve months next preceding the filing of this Application has been Senior Executive Assistant of The St. Louis, Brownsville & Mexico Railway and of said operation thereof by Guy A. Thompson, Trustee.

D

The proposal through this Application is to permit Applicant to cancel, and to approve the cancellation by Applicant of, one certain contract entered into between Applicant and The St. Louis, Brownsville & Mexico Railway Company (hereinafter called Brownsville Company) November 1, 1904, and one certain supplement thereto between Applicant and said Brownsville Company and Frank Andrews, its Receiver, with respect to trackage rights of said Brownsville Company on the main line track of Applicant between Corpus Christi and Robstown, both in Nueces County, Texas, including rights to use terminals, side tracks, passing tracks and appurtenances for the operation of trains and carrier business.

E

Applicant does not propose to abandon its line of railway or any portion thereof, but seeks solely the termination and cancellation of said contract.

F

The purpose of this Application is to procure from the Commission a Certificate of Public Convenience and Necessity authorizing termination by Applicant of one certain Memorandum of Agreement between The Texas Mexican [fol. 289] Railway Company and The St. Louis, Brownsville & Mexico Railway Company entered into November 1, 1904, and one certain Supplemental Agreement to said Memorandum of Agreement between The Texas Mexican Railway Company and The St. Louis, Brownsville & Mexico Railway Company and Frank Andrews, its Receiver, entered into October 1, 1914.

The pertinent facts touching the making of and operations under said agreement and reflecting changed conditions which Applicant deems in its interest to require termination of said memorandum and supplement, are substantially as follows:

(1) At the time said memorandum agreement was entered into on October 1, 1904, Applicant owned and operated a line of railway consisting of main line, side tracks, passing tracks, water stations, switches, real estate and its appurtenances incident and necessary to the carrier use of Applicant in operating passenger and freight trains, between the town of Corpus Christi, Texas, and the point at Robstown, Texas, where the main lines of Applicant and of The St. Louis, Brownsville & Mexico Railway Company cross, being a total distance of 16 miles, 2056 feet, thence to Laredo in Webb County, Texas. At the time said agreement was made said Brownsville Company did not own, operate or control any line of railway entering Corpus Christi, Texas, and by said original agreement, Applicant, upon conditions and limitations in said agreement stipulated, accorded to said Brownsville Company the right to [fol. 290] carry over the above described tracks from Corpus Christi, Texas, to a point where said main lines cross at Robstown, Texas, such freight, mail, express and passengers as said Brownsville Company should desire, and to receive for its own use and compensation all revenue arising from such service, and the further right to generally extend and transact its business as a common carrier over the last above described properties of the Ap-

plicant: Applicant was obligated by said agreement to maintain said line of railway as above described in a good and safe condition, and the engines and cars of said Brownsville Company, while on said described portion of railway, should be managed and operated by employees of said Brownsville Company, subject to reasonable rules and directions of the operating department of Applicant, and other stipulations with respect to train rights not necessary to here detail, but fully stipulated in said original agreement.

(2) In consideration for said grant said Brownsville Company agreed to pay to Applicant a fixed annual rental of $3,277.80 in equal monthly installments of $273.15, which rental represented 2½% of the estimated value of the privileges granted, and in addition thereto agreed to pay a certain proportion of the actual cost of maintenance on the properties used on a "car basis," which is defined in said agreement to be a sum which shall bear the same proportion to the entire cost of maintenance of tracks, buildings, etc., as the number of passenger and freight cars moved over said road between said points by said Brownsville [fol. 291] Company shall bear to the total number of cars moved over said line between said points; plus one-half of all taxes levied and charged against said property; plus the costs of agents, telegraph operators, clerks and all other expenses of every character at said Robstown and Corpus Christi and intermediate stations on the said car basis.

(3) Said agreement further provided that the sum of $5,000 which had been donated to said Brownsville Company by the citizens of Corpus Christi for passenger station development at Corpus Christi should be used for that purpose, and that each the Applicant and said Brownsville Company should be equally interested and should equally bear any expense incurred for passenger station development in excess of said $5,000, and a similar provision was made with respect to sharing the expense of constructing a joint combination freight and passenger station at Robstown, where the lines of said Brownsville Company and Applicant cross.

(4) Further stipulations were contained in said agreement, which are not necessary to here review.

(5) By Article 12 of said agreement it took effect November 1, 1904, and was to continue for the full term of 50 years unless sooner terminated for causes stipulated, and the express provision is contained in the contract that it may be terminated without giving any reason therefor, by either party, upon giving twelve months notice of an intention to terminate.

(6) On October 1, 1914, said supplemental agreement was [fol. 292] entered into between Applicant and said Brownsville Company and Frank Andrews, its Receiver, which supplemental agreement stipulated that it should be binding upon termination of the receivership, which has long since terminated.

(7) Said supplemental agreement reaffirmed the original agreement as modified by the supplemental agreement, which modifications were substantially an extension of the rights on the tracks of Applicant from the center of the crossing of the lines of said railways at Robstown to the western yard limits of Applicant at Robstown, being a point 1000 feet west of the west switch stand of Applicant at Robstown, together with all tracks and spurs in said yard limits, and the right of Applicant, for the purpose of interchanging cars and of taking water at the Brownsville Company's tank and of turning engines and cars of Applicant at Robstown, to use the two wye tracks at Robstown and the main track of said Brownsville Company between the crossing of the two main lines at Robstown and 500 feet south of said wye track switches. Said supplemental agreement further provided that maintenance of that part of the line of Applicant from the center of the crossing of said two main lines at Robstown to a point 2361 feet west thereof should be included in the original agreement for maintenance and that the expense should be prorated in accordance therewith.

(8) Said supplemental agreement further made other provisions with respect to stationery not necessary to here review.

[fol. 293] (9) Since the respective executions of said original agreement and supplemental agreement, said original agreement and as modified by said supplemental agreement has been recognized as in full force and effect by Applicant and by said Brownsville Company at all times, by

said Frank Andrews, Receiver, so long as said receivership existed, and by said Trustee, since the operations of said Brownsville Company have been conducted by said Trustee.

(10) At the time said agreement and supplement thereto were executed the provisions for maintenance compensation to Applicant were reasonable by reason of the fact that said Brownsville Company at those times made full use of its rights and privileges, and locomotives were not used over said tracks which were too heavey for their design. Since said dates, however, said Brownsville Company acquired ownership, control and operation of San Antonio, Uvalde & Gulf Railroad Company, (or both have been brought under common control), which crossed the main line of St. Louis, Brownsville & Mexico Company at Odem, Texas, a point at about 20 miles distant from said Corpus Christi, and which gave said Brownsville Company a direct line into Corpus Christi, Texas, and said Brownsville Company and said Trustee have moved the vast majority of their cars and trains, both freight and passenger, into Corpus Christi over its own line and not over the line of Applicant. This change in movement materially decreased the maintenance expense paid by said Brownsville Company, which still uses its said rights [fol. 294] privileges chiefly in full competition with Applicant between Corpus Christi and Robstown on its own line.

(11) The nature of the terrain from Robstown to Corpus Christi is practically level but a few feet above sea level, making drainage difficult and trackage maintenance proportionately expensive, particularly when subjected to the pounding of heavy locomotives such as are used by the Brownsville Company and said Trustee. The rails and tracks of Applicant are not designed for use by heavy locomotives, but the Brownsville Company and Trustee in recent years have used and now use on said tracks locomotives with dead tonnage greatly in excess of that of any locomotive used by Applicant. The use of such heavy locomotives materially increases track damage and maintenance while the decreased number of cars moved by the Brownsville Company since it has operated over the S. A. U. & G. line into Corpus Christi has correspondingly decreased the proportion of maintenance expense borne by the Brownsville Company, thereby rendering said contract burdensome and unprofitable to Applicant.

(12) Applicant is an independent short line, depending solely upon its own operations for its operating and maintenance costs; it is wholly without credit and its continuous and continued operation exacts that it be relieved from every contract of every sort which is burdensome to Applicant and which deprives it of traffic, when such relief may be properly accorded to Applicant.

[fol. 295] (13) In the exercise of its rights under said agreement and supplement thereto said Brownsville Company and Trustee in the operation thereof compete with Applicant for all freight originating at Corpus Christi and at Robstown, Texas, as well as at intermediate points on the line of Applicant, and which said Brownsville Company and Trustee are enabled to serve only by reason of the existence of said contract and supplement. Said competition deprives Applicant of revenues originating and terminating on its own line and which Applicant would receive without incurring any operating expense not necessarily now incurred.

(14) The equal privileges for switching in the terminals at Corpus Christi have become burdensome to Applicant in this: Trainmen employees of Applicant are asserting claims against Applicant to be paid by Applicant for all switching done in the terminals of Applicant by Brownsville Company and by said Trustee. Applicant has denied its liability for such claims, but they are being pressed against the Applicant and to be retroactive. Said trainmen are demanding and have demanded that Applicant either terminate said contract giving rights to said Brownsville Company and operating thereof in the terminals of Applicant at Corpus Christi, or that Applicant shall pay to its trainmen employees for the full service done in said terminals by said Brownsville Company and its Trustee, as though said service had been performed by Applicant. The outcome of said demand, so far as retroactive compensation is con-
[fol. 296] cerned, is now uncertain, but Applicant is of opinion, based upon rulings in other cases by the Railroad Adjustment Board upon claims of employees for compensation where work was done upon the tracks of the owning carrier by another under contract, that Applicant could not afford to hazard its being required to pay such compensation, especially after demand by said employees that

the contract be terminated, for the financial condition of Applicant is such that should it be required to pay its employees for past services performed by the Brownsville Company and by the Trustee on the tracks of the Applicant at Corpus Christi, the danger of and the necessity for receivership would become real.

(15) Because of the facts aforesaid, and believing it imparative in the public interest and for the continued operating by Applicant without the hazard of a receivership, Applicant exercised its right of cancellation upon twelve months notice authorized by said contract, and on November 1, 1940, gave notice to the said H. R. Safford, Senior Executive Assistant of the Brownsville Company and of said operations by said Guy Thompson, Trustee, of the purpose and intention of Applicant to exercise its right to cancel said contract, at the expiration of twelve months from said date, receipt of which was acknowledged by said Senior Executive Assistant in charge of operations.

G

Correspondence in regard to this Application should be addressed to J. D. Dodson, General Counsel, The Texas [fol. 297] Mexican Railway Company, 1822 Smith-Young Tower, San Antonio, Texas.

H

Applicant is organized under the laws of Texas and is authorized to operate in Texas only.

I

The Board of Directors of Applicant on June 25, 1941, ratified the giving of said notice and authorized the filing of this Application by Resolution duly enacted at a meeting of the Board of Directors of Applicant at its general office in Laredo, Texas.

J

Applicant is not operated by a Receiver.

K

There is attached to this Application as a part thereof "Exhibit No. 1," which shows a map drawn to scale of the line of railway over which said Brownsville Company and Guy Thompson, Trustee, now operate under the provisions of said contract and supplement thereto.

Premises Considered, Applicant respectfully prays for issuance of proper notice hereof and that upon a hearing Applicant be permitted to exercise the right given to it by said contract to cancel the same on November 1, 1941, which is twelve months after notice of such cancellation as provided by said contract, and that such cancellation by Applicant be approved.

[fol. 298] Respectfully submitted, (Signed) The Texas Mexican Railway Company, By M. M. Leyendecker, Vice-President and General Manager.

Attest: (Signed) G. B. Winch, Secretary. (Seal.)

STATE OF TEXAS,
County of Webb:

M. M. Leyendecker, having been first duly sworn, upon his oath says: My name is M. M. Leyendecker; I reside in the City of Laredo, Webb County, Texas; I am the duly elected, qualified and acting Vice-President and General Manager of The Texas Mexican Railway Company, Applicant in the foregoing Application to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity, authorizing and approving cancellation of that one certain contract between Applicant and St. Louis, Brownsville & Mexico Railway Company entered into November 1, 1904, and one certain supplement thereto entered into October 1, 1914, with respect to trackage rights over and upon the tracks of Applicant between Corpus Christi and Robstown, Nueces County, Texas; I have personal knowledge of the facts set forth in the foregoing Application and the same are true within my knowledge, except where made upon information and belief, and those I verily believe to be true; I have been directed by Resolution of the Board of Directors of Applicant to execute and file said [fol. 299] Application in behalf of Applicant.

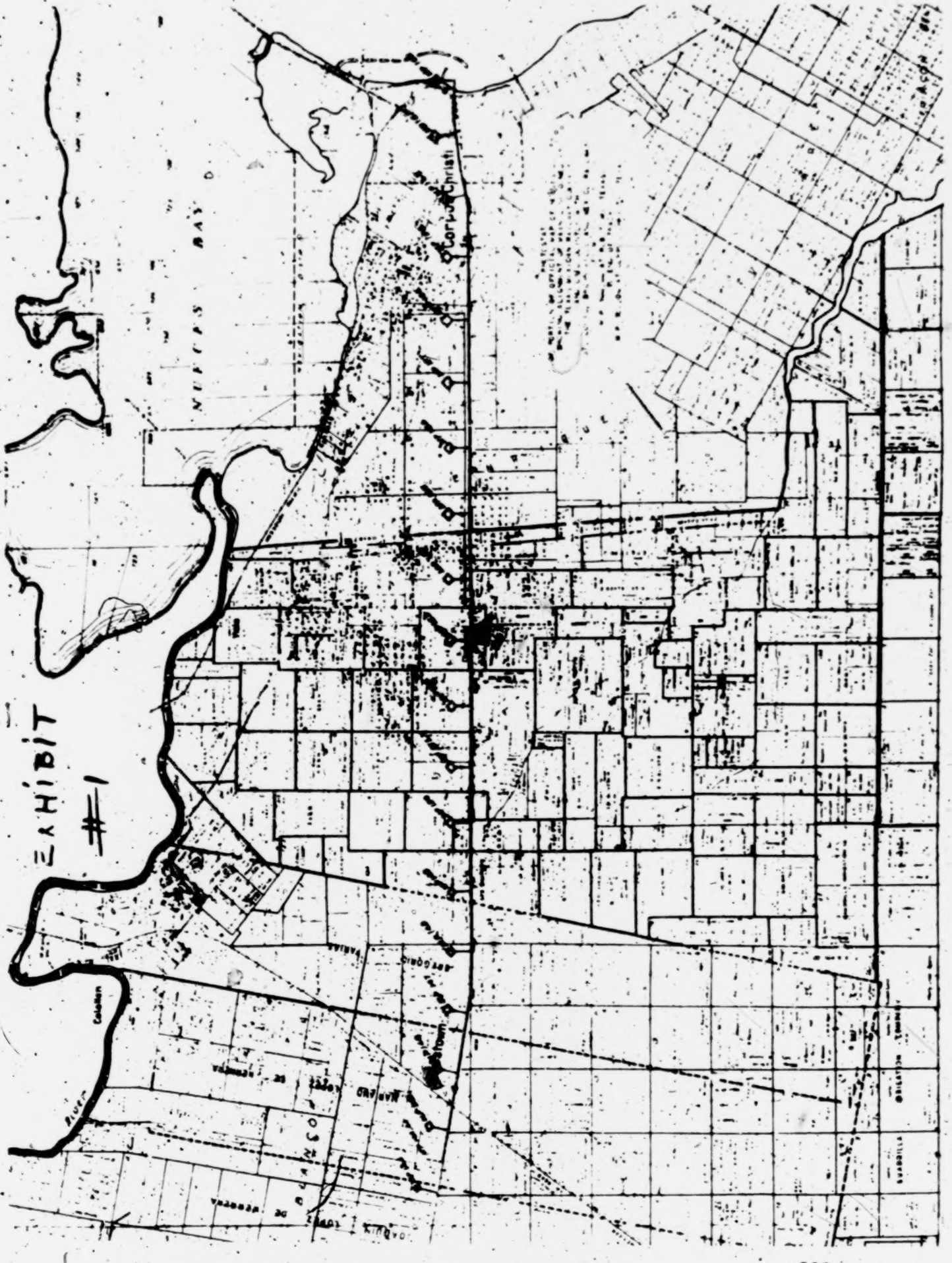
(Signed) M. M. Leyendecker.

Sworn to and subscribed before me this the 31st day of July, 1941. (Signed) L. L. Leyendecker, Notary Public, Webb County, Texas. (Seal.)

(And attached to said Exhibit being Exhibit 1, the map referred to therein, and being as follows, to-wit:)

(Here follows Photolithograph, see folio 300.)

EXHIBIT NO. 1



[fol. 301] Endorsement: Copy. Exhibit #1. Filed in evidence by Defendant 8-27-'43 Ben A. Ligon, District Clerk, Nueces Co., Texas by Louise Eubank, Dy.

DEFENDANTS EXHIBIT NO. 28

Interstate Commerce Commission

Office of the Secretary, Washington

W. P. Bartel, Secretary, Mr. J. D. Dodson, General Counsel, Texas Mexican Railway Company, 1819 Smith-Young Tower, San Antonio, Texas.

DEAR SIR:

This will acknowledge the receipt of your letter of August 4th, enclosing original and nine copies of the application of the Texas Mexican Railway Company for authority to cancel its trackage agreements with the St. Louis, Brownsville & Mexico Railway Company, under which the latter company operates over the line of the Texas Mexican between Corpus Christi and Robstown, Texas.

The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Section 1 (18) of the Interstate Commerce Act would [fol. 302] extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Company. I note that on November 1, 1940, notice in accordance with the terms of the trackage agreements was given to the Brownsville Company of the intent of the Texas Mexican to cancel the contract. No application has been filed by the Brownsville Company.

Accordingly the application and copies are returned herewith.

Very truly yours, W. P. Bartel, Secretary.

Encls.

Cc—

Mr. H. R. Safford, St. Louis, Brownsville & Mexico Railway Company, Houston, Texas.

Endorsement: Exhibit #2. Filed in evidence by Defendant 8-27-43 Ben A. Ligon, District Clerk, Nueces Co., Texas by Louise Eubank, Dy.

Mr. Crenshaw: That is all.
Mr. Tarbon: That is all.

Testimony closed on motion to stay and plea of jurisdiction.

[fols. 303-304] Order Overruling Motion to Stay, etc.

The Court: Gentlemen, I am going to overrule the motion to stay and plea of jurisdiction, and we will go to trial in the morning at 9:30 o'clock.

Mr. Crenshaw: Note our exception, Your Honor.

[fols. 305-1129] In Court of Civil Appeals of Texas, Fourth Supreme Judicial District

Statement of Points Upon Which Appeal Is Predicated

First Point

It appearing from the Tex-Mex pleadings, admissions and the undisputed evidence that Brownsville Trustee, on and at all times subsequent to October 28, 1940, was operating the properties of The St. Louis, Brownsville and Mexico Railway Company pursuant to Section 77 of the Bankruptcy Act and under appointment by and orders of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, a court of competent jurisdiction, the trial court should not have rendered any judgment or entered any order other than that prayed for by said Brownsville Trustee in his motion alternatively to dismiss this proceeding or to stay the same until Tex-Mex had secured authority for the prosecution thereof from said United States District Court. (Germane to Motion for Judgment Non Obstante, Paragraph 2, Tr. 101, brought forward on Motion for New Trial, Tr. 117.)

Second Point

It appearing that Brownsville Trustee, at all times material to the matters complained of, was a carrier by railroad engaged in interstate commerce, and that a substantial part of the relief sought by Tex-Mex was the fixation of compensation to be paid to it by Brownsville Trustee for the use of the Tex-Mex tracks and facilities, it was funda-

ental error for the trial court to render any judgment other than a judgment of dismissal of this cause. (Germane to motion for judgment non obstante, Paragraph 3, Tr. 102, brought forward in Motion for New Trial, Tr. 117 and Assignments of Error Nos. 1 and 2, Tr. 117-118.)

Third Point

It appearing from the undisputed evidence that Brownsville Trustee, at all times material to this case, was a carrier by railroad engaged in interstate commerce, that a substantial part of the relief sought by Tex-Mex was the fixation of compensation to be paid to it by Brownsville Trustee for the use of Tex-Mex tracks and facilities, and it being admitted [fol. 1130] that no certificate of public convenience and necessity had been sought or secured from the Interstate Commerce Commission fixing or approving the fair rate of such compensation or authorizing the abandonment of operations by Brownsville Trustee, the trial court should not have rendered any judgment or entered any order other than one dismissing this proceeding. (Germane to Motion for Judgment Non Obstante, Paragraph 3, Tr. 102, brought forward in Motion for New Trial, Tr. 117, and Assignments of Error Nos. 1 and 2, Tr. 117-118.)

Fourth Point

The notice of termination given by the Tex-Mex under Article 12 of the trackage contract of 1904, did not have the effect of terminating that contract (which as remained and is still in force), because both the Tex-Mex and Brownsville Company and the Brownsville Trustee were and are carriers by railroad subject to the Interstate Commerce Act and to Section 1 (18) thereof, and no certificate of public convenience and necessity having been issued by the Interstate Commerce Commission authorizing abandonment of the Trustee's operations over the lines covered by the trackage contract, such operations could not lawfully be stopped or abandoned, nor the trackage contract (granting the right to conduct such operations) lawfully cancelled or terminated. If the trackage contract of 1904 is still in effect it alone is the measure of the compensation to be paid by the Trustee for his use of the properties covered thereby. (Germane to Motion for Judgment Non Obstante, Paragraph 3, Tr. 102, brought forward in Motion for New Trial and Assignments of Error Nos. 1 and 2, Tr. 117-118.)

Fifth Point

The Court erred in submitting to the jury its Special Issue No. 1, inquiring the value per day of the use made by Brownsville Trustee of Tex-Mex's property, for the reason that the only evidence introduced in the case was as to the value of the total use of Tex-Mex's property, and the evidence further showed that all of said property was subjected to use by both Brownsville Trustee and Tex-Mex, and a substantial part of it by a third carrier, and no evidence was introduced showing the quantum or proportionate part [fol. 1131] of the use which was made of the property by Brownsville Trustee. (Germane to Motion for Judgment Non Obstante, Paragraphs 4 and 5, Tr. 102-103, brought forward in Motion for New Trial, Tr. 117.)

Sixth Point

The Court erred in submitting any issue to the jury and in rendering judgment for Tex-Mex, for the reason that the undisputed proof showed that after the effective date of its purported notice to terminate the contract, Tex-Mex from November 1, 1941, down to and including the time of trial, continuously ratified such contract and recognized its continuing existence by voluntarily listing scheduled trains of Brownsville Trustee upon its main line between Robstown and Corpus Christi in its published time cards or schedules, and by the issuing of clearances for such trains and special orders for the operation between Corpus Christi and Robstown by Brownsville Trustee of other trains, and by such action had waived and recognized the invalidity of its purported notice to terminate the contract and by such conduct has admitted that the same remains in full force and effect. (Germane to Motion for Judgment Non Obstante, Paragraph 6, Tr. 103, brought forward in Motion for New Trial.)

Seventh Point

It appearing from the face of the Tex-Mex petition, from the undisputed evidence and from the findings of fact of the trial court that Brownsville Trustee operated under the trackage contract and supplement from the date of said trustee's appointment and that exclusively Brownsville Trustee has been making use of said property from and after November 1, 1941, it was error for the trial court to enter any judgment as to Brownsville Company except a judgment

dismissing it with costs. (Germane to Assignments of Error Nos. 1, 2, 4 and 5, Tr. 123-124.)

[fol. 1132] In Court of Civil Appeals of Texas, Fourth Supreme Judicial District

No. 11387

The St. Louis, Brownsville and Mexico Railway Company et al., Appellants,

v.

The Texas Mexican Railway Company, Appellee

Appeal from Nueces County

Opinion—Filed May 31, 1944

The St. Louis, Brownsville and Mexico Railway Company (hereinafter referred to as Brownsville Railway) and its Trustee, Guy A. Thompson, have appealed from a judgment for the sum of $184,929.85 rendered against the Trustee and in favor of the Texas Mexican Railway Company (hereinafter referred to as Tex-Mex Railway). The amount of the judgment is based upon a jury finding that the reasonable value per day of the use by Thompson Trustee, of the railroad tracks and facilities belonging to the Tex-Mex Railway, situated in Corpus Christi, Texas, and between said City and Robstown, Texas, was $278.09 per day from November 1, 1941, to August 27, 1943, inclusive, a total of 665 days.

According to our view of the case, there are two questions of substance involved. One relates to the jurisdiction and power of the trial court to render the judgment involved, and the other relates to the sufficiency of the evidence to support the jury's finding.

In 1904 Tex-Mex Railway owned and operated a railway line between Laredo and Corpus Christi. The Brownsville Railway owned and operated a railway line between Houston and Brownsville. The tracks of the Brownsville Railway and the Tex-Mex Railway intersected at Robstown, approximately sixteen and a half miles west of Corpus Christi. The Brownsville Railway, being desirous of running certain

of their trains into Corpus Christi, negotiated a contract with the Tex-Mex Railway under the terms of which it secured the right to operate trains over the Tex-Mex tracks between Robstown and Corpus Christi and make use of the Tex-Mex terminal facilities at Corpus Christi. This con- [fol. 1133] tract was dated November 1, 1904, and provided for a term of fifty years unless sooner terminated by the parties. Compensation or rental to the Tex-Mex was fixed by the contract through the adoption of a formula based upon two and one-half per cent of the estimated valuation of the privileges granted to the Brownsville Railway, and the proportional cost of maintenance and operation according to a "car basis," that is, the Brownsville Railway agreed to pay its proportionate part of maintenance and operation costs according to the ratio its car operations over the Tex-Mex tracks bore to the total aggregate of cars so operated over said tracks. Brownsville Railway further obligated itself to pay annually an amount equal to one-half the amount of taxes levied and assessed against the Tex-Mex properties jointly used by the Brownsville Railway.

This contract contained the following provision: "It is further agreed that this contract may be terminated without giving any reason therefor, by either party, upon giving twelve months' notice of such intent to terminate the lease."

On the first day of October, 1914, the contract was modified by the parties in certain particulars. Maintenance cost was placed on a "car mileage basis" rather than a "car basis," but the provision of the original agreement above quoted remained unchanged. The evidence indicates that the amount of daily rental arrived at by means of the original contract formula, as modified in 1914, would be substantially less than the amount set forth in the jury verdict.

On October 31, 1940, the Tex-Mex Railway gave written notice of its intention to terminate the contract twelve months from date of notice. Despite this action the Trustee of the Brownsville Railway, after November 1, 1941, continued to operate over the Tex-Mex tracks and facilities, and was informed by the Tex-Mex Railway that a charge of $509 per day for the use of these facilities would be made. The Trustee and the Brownsville Railway refused to pay this rental or any other charge, save that provided for in the contract of November 1, 1904, as supplemented by the [fol. 1134] agreement of October 1, 1914.

This suit followed. The Tex-Mex Railway prayed for a permanent injunction restraining the Brownsville Railway from making use of its tracks and facilities, but such relief was denied by the trial court, and no complaint of this ruling is made here.

The judgment contains certain findings made by the trial court, viz: (1) The contract of November 1, 1904, as supplemented by agreement of October 1, 1914, had been adopted by the Trustee for the Brownsville Railway; (2) the Trustee had operated under the contract from the time of his appointment (1933) until October 31, 1941; (3) due notice of termination of said contract had been given by the Tex-Mex Railway, so that the contract terminated as of October 31, 1941, but (4) the Trustee had since that date made use of the Tex-Mex properties over protest of the Tex-Mex Railway, claiming a right to do so under the contract of November 1, 1904. Based upon these findings and the verdict of the jury, judgment was rendered as above indicated. However, no execution of the judgment (other than for costs) was directed, but the judgment was ordered certified to the United States District Court for the Eastern District of Missouri (Eastern Division), the court having jurisdiction over the bankruptcy proceedings affecting the Brownsville Railway.

The relief prayed for by the Tex-Mex Railway and granted by the court below was an award of compensation for the use of its property (for a specified period of time) by another having no contract rights authorizing such use.

It is clear that unless the jurisdiction of the State District Court over the subject matter has been in some way curtailed or restricted by constitutional federal action, the court below was authorized and fully empowered to settle and determine this controversy by rendering a judgment with reference thereto.

Appellants suggest that the trial court was deprived of jurisdiction over the subject matter by federal action under the bankruptcy power and under the power to regulate interstate commerce.

[fol. 4135] On June 22, 1933, L. W. Baldwin and Guy A. Thompson were appointed trustees for the Brownsville Railway in accordance with section 77 of the Bankruptcy Act; 11 U. S. C. A. Sec. 205. Baldwin resigned effective December 26, 1935, and since that time Guy A. Thompson has served as sole trustee for the Brownsville Railway.

It appears from the record that a number of orders relating to the prosecution of claims against the debtor in the process of reorganization have been entered by the bankruptcy court, i. e., the United States District Court for the Eastern District of Missouri. The order last entered and now in effect provides in part:

> "That the commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings; provided, however, that suits or claims for damages caused by the operations of trains, buses or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated."

Appellants cite a number of cases which discuss the powers of the bankruptcy court, as well as the authority of trustees appointed under Section 77 of the Bankruptcy Act. None of these cases, however, is authority for denying to the state court its asserted jurisdiction over the controversy presented here. The case of Anderson v. Scandrett, 19 Fed. Sup. 681, is somewhat similar on the facts, and in our opinion supports a holding in favor of the trial court's jurisdiction. We hold that the fact that the Brownsville Railway is in the process of reorganization in bankruptcy (Section 77) does not deprive the state district court of jurisdiction of the subject matter of this controversy.

We next consider the effect of the federal exercise of authority under the interstate commerce power. It is con- [fol. 1136] ceded that both corporations here involved are engaged in interstate commerce. Appellants particularly rely upon Section 1 (18) of the Interstate Commerce Act. 49 U. S. C. A., Sec. 1, par. (18), Transportation Act of February 28, 1920, c. 91, Sec. 402, 41 Stat. 477.

This paragraph reads as follows:

> "*Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under

this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Appellants cite the case of Transit Commission v. United States, 289 U. S. 121, —— Sup. Ct. ——, 77 L. Ed. 1075, as authority for the proposition that the joint trackage agreement of 1904 could not be terminated in accordance with the terms of the contract itself, unless and until a certificate of public convenience and necessity had been procured from the Interstate Commerce Commission.

In the case cited it was held that an agreement entered into by and between the Long Island Railroad Company and the Pennsylvania Railroad Company giving to the Long Island the right to make use of the facilities of the [fol. 1137] Pennsylvania Tunnel and Terminal Railroad Company (a subsidiary of the Pennsylvania Company, and its lessor) under terms and conditions agreed upon by the parties and approved by the Interstate Commerce Commission was valid and enforcible even though not approved by the Transit Commission of the State of New York.

The present case is distinguishable upon the facts. It appears that the Tex-Mex Railway made application to the Interstate Commerce Commission for permission to terminate the contract of November, 1904, in accordance with the provisions thereof. This application was returned by the Secretary of the Commission, together with this statement that:

> The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Sec. 1 (18) of the Interstate Commerce Act would extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Co.

note that on Nov. 1, 1940, notice in accordance with the terms of the trackage agreement was written to the Brownsville Company of the intent of the Texas Mexican to cancel the contract. No application has been filed by the Brownsville Company. Accordingly the application and copies are returned herewith."

Since receipt of this communication neither the Tex-Mex Railway, nor the Brownsville Railway (or its Trustee) have in any way sought to invoke the jurisdiction of the Interstate Commerce Commission with reference to this controversy. The trial court evidently refused to issue the injunction prayed for by the Tex-Mex Railway upon the theory that Section 1 (18) of the Interstate Commerce Act required that the Brownsville Railway continue to operate over the Tex-Mex tracks until such time as a certificate of public convenience and necessity permitting abandonment of such operations should be secured. As above indicated, that ruling is not questioned here. If it be conceded that said Section 1 (18) effectively prevented the issuance of an [Feb. 1138] injunction against the Brownsville Railway and its Trustee, it does not necessarily follow that such legislation kept in force and effect the provisions of the contract of 1904 relating to rentals and other charges. Our conclusion is that, as no affirmative action had been taken by the Interstate Commerce Commission which would in any way conflict with the action taken by the court below, said court had jurisdiction of this controversy and was empowered to render judgment. We also hold that the 1904 contract was legally terminated and cancelled as of October 31, 1941.

Since the Trustee of the Brownsville Railway has been making use of the tracks and facilities owned by the Tex-Mex Railway since that date, without a contract, it follows that he as Trustee is liable to pay the Tex-Mex Railway the reasonable value of such use. We next consider appellants' attack upon the legal sufficiency of the evidence to support the jury's finding as to the value of such use.

The issue submitted to the jury reads as follows:

"How much do you find, from a preponderance of the evidence, to be the reasonable value per day of the use by the defendant, Guy A. Thompson, Trustee, of the St. Louis, Brownsville and Mexico Railway Company

to (of) the railroad tracks and facilities belonging to plaintiff situated in Corpus Christi, Texas, and from Robstown, Texas, to Corpus Christi, Texas? Answer in Dollars and Cents per day, if any."

The appellants made five objections to the submission of this issue, which were overruled by the trial court. Three are predicated upon the proposition that the 1904 contract is still in existence. Another asserts that no final judgment can be rendered on the verdict because it is not shown when the Trustee will cease to use the premises and properties involved. None of these is well taken. The remaining objection, and the only one raising a question as to the evidence, reads as follows:

"Defendant (Trustee) objects to the submission of Special Issue No. 1 as a whole for the reason that there [Vol. 1139] is no evidence to support any amount as the value per day of the use by defendant of the premises involved, the only evidence being as to the value of the total and exclusive use of the premises, and the evidence showing that all of the premises are and have been subjected to use by one other carrier, and a part of the premises by two other carriers, and no evidence was adduced showing the proportionate part of the total use which this defendant made of said premises."

The objection above stated was urged by appellants in substantially the same form in a motion for judgment non obstante veredicto and in motion for new trial, and carried forward into their brief by means of a point.

The contention raised is one of law, that is, that there is no evidence sustaining the jury's finding that the reasonable value of the use was $278.09 per day.

The record of the testimony relating to the question contained in the issue submitted to the jury is detailed and voluminous. We can here give but a brief summary of the same.

Joe Roscoe, president of the real estate board of Corpus Christi, and a member of the board's appraisal committee, testified that he, together with two other members of the appraisal committee, made an investigation of the value of the lands occupied by the Tex-Mex tracks and installations used by the Brownsville Railway. Roscoe gave his estimate of value as to the various tracts and parcels of

lands involved exclusive of the value of the installations thereon and gave $475,584.88 as his estimate of the total value of said lands. The criterion taken by Roscoe was the fair market value of the land involved, that is, the amount of money a seller would take and a purchaser would give, assuming both parties were willing and able to complete a transaction, but neither of them was under compulsion to do so.

The witness, Terrell Bartlett, a practicing civil and mechanical engineer experienced in railway valuations, testified that in his opinion the cost of reproduction of the [Vol. 1140] Tex-Mex tracks and installations here involved would amount to $910,392. Costs were estimated on a five-year average, ending December 31, 1942. Aggregate depreciation was estimated at $156,168, leaving a net value of the Tex-Mex tracks and installations at $820,224 on a cost of reproduction less depreciation basis. Bartlett accepted Roscoe's figure of $475,584.88 as the value of the lands involved, and thus arrived at a total of $1,295,808.88 as the value of the Tex-Mex properties and installations used by the Brownsville Railway.

Bartlett considered six to eight per cent of the value arrived at in the manner set forth as being a fair return upon the property. He testified that using the values established as herein calculated, the actual maintenance costs as shown by the books of the Tex-Mex Railway, the amounts actually paid in taxes, he would consider an amount of $147,438 to $173,395 per annum as a fair rental value of the property.

H. T. Bradley, the valuation engineer of the Brownsville Railway, placed the fair value of the tracks and facilities of the Tex-Mex Railway being used by the Trustee of the Brownsville Railway at $514,134. This estimate seems to be founded upon an original cost basis as opposed to the cost of reproduction less depreciation basis employed by Bartlett.

Appellants' points do not assert that the verdict of the jury is excessive. No request was made for an explanatory instruction which would restrict the jury to a particular method or formula for determining either the values of the property involved or the reasonable value of the use thereof. The interrogatory submitted did however contain a controlling fact-issue. Rule 279, R. C. P. The question therefore presented is whether or not the evidence

and such permissible inferences as can be drawn therefrom reasonably support the conclusion that the sum of $278.09 per day is the reasonable value of the use of the properties made by the Trustee of the Brownsville Railway.

Our conclusion is that the evidence supports the verdict. Appellants' chief complaint seems to be that there is no [fol. 1141] evidence of a per diem value of the use, and that there is not a sufficient development of the proportionate use made of the facilities by the Brownsville Railway, the Tex-Mex. Railway and the Texas and New Orleans Railway Company.

As to the first complaint, appellants rely upon cases such as Hudson v. Wilkinson, 45 Tex. 444, and Brown v. Spector, Tex. Civ. App., 70 S. W. 2d 478, in which it is held that the rental value of certain properties wrongfully detained from the owner for a considerable period of time can not be determined upon a per day rental basis. This rule applies when it is shown that the per day rental for any particular property over a period of time is greater than the amount that would be charged if rentals were calculated upon a time unit of more than a day. Appellants point out that the amount charged for a hotel room for a month is generally less if calculated upon a weekly basis, rather than upon a daily basis. As we view the case here, however, the evidence permits an estimate of the reasonable value of the use upon an annual basis, and the day may be taken as a convenient fraction of the year. There is no indication in the evidence that properties such as are here involved have a rental value per day which if charged over the period of a year would exceed the amount charged upon an annual basis.

As to the proportional use of the properties made by the railways mentioned, appellants' complaint is that the use of the facilities by the owner, the Tex-Mex Railway, was not developed in detail. The exact proportionate use on a "car basis," a "car mileage basis," a total tonnage basis, or some other basis, is not definitely shown. It is not, however, accurate to say that the record contains no basis for an estimate of the use of the tracks and facilities by the Tex-Mex Railway. It appears that there was a joint use. The Tex-Mex Railway possessed the right to make use of its own facilities and exercised this right as its necessities demanded. The Texas and New Orleans

Railway Company apparently made some limited use of the Tex-Mex Corpus Christi yards. Considering the situation of the Brownsville Railway, it would seem unconscionable [fol. 1142] to charge said railway with a sum equal to the value of a total exclusive use of the properties. It does not appear that this was done by the trial court in accepting and giving effect to the jury's finding. The controlling issue as submitted was somewhat general and allowed to the jury a wide degree of latitude in arriving at its estimate of the reasonable value of the use. However, the issue seems to have been satisfactory in form, as neither party made objections thereto with reference to the form of the question. Upon the point raised by appellants—the sufficiency of the evidence as a matter of law to support the jury's finding—we must conclude, in accordance with the rules applicable to such situations, that the verdict has support in the evidence. Sturtevant v. Pagel, 134 Tex. 46, 130 S. W. 2d 1017; 3 Tex. Jur. 1093, Sec. 767.

What has been said disposes of the principal contentions presented by appellants on this appeal. As hereinabove indicated, the trial court decreed that the contract of November, 1904, as supplemented in 1914, has been lawfully terminated and was consequently of no further force and effect. The record will not support the theory that after the termination of this agreement, the Tex-Mex Railway ratified the contract or recognized its existence. Judgment decreeing the contract's termination was adverse to both the Brownsville Railway, the debtor in bankruptcy proceedings, and its Trustee. These parties made a joint defense to appellee's contention that there was no contract in existence. An award of costs jointly and severally against the Brownsville Railway and the Trustee was not erroneous and seems permissible under the orders entered by the bankruptcy court and introduced in evidence.

Being of the opinion that appellants' points fail to disclose reversible error an affirmance of the judgment of the court below will accordingly be ordered.

Affirmed.

James R. Norvell, Associate Justice.

Opinion delivered and filed May 31, 1944.

[fol. 1143] In Court of Civil Appeals of Texas
From the 94th District Court of Nueces County

No. 11387

The St. Louis, Brownsville & Mexico Railway Company, et al., Appellants,

vs.

The Texas Mexican Railway Company, Appellee

Judgment—May 31, 1944

This cause came on to be heard on the transcript of the record; and the same being examined, because it is the opinion of the Court that there was no error in the judgment of the Court below, it is therefore considered, adjudged and ordered that said judgment be, and it is hereby, affirmed; that appellants, The St. Louis, Brownsville & Mexico Railway Company and Guy A. Thompson, Trustee for the St. Louis, Brownsville & Mexico Railway Company, and surety, American General Insurance Company, pay all costs in this behalf expended and incurred, and this decision be certified below for observance.

[fol. 1144] In Court of Civil Appeals of Texas

[Title omitted]

Motion of Appellants for Rehearing—Filed June 10, 1944

Appellants, The St. Louis, Brownsville and Mexico Railway Company and Guy A. Thompson, Trustee for The St. Louis, Brownsville and Mexico Railway Company, Debtor, respectfully move this Court to set aside the opinion and judgment rendered in this cause on May 31st, 1944, affirming the judgment of the trial court, and pray that a rehearing be granted herein, and that on such rehearing judgment of the trial court be by this Court reversed and judgment rendered in favor of Appellants, or, in the alternative, that the judgment of the trial court be reversed, and the case be remanded for a new trial.

As grounds for this their motion, Appellants respectfully submit that this Court has erred in the following several respects:

I

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trial court had jurisdiction of the cause of action alleged by the appellee because it appearing from the Appellee's pleadings, admissions, and the undisputed evidence that Appellant Trustee, on and at all times subsequent to October 28, 1940, was operating the properties of the St. Louis, Brownsville and Mexico Railway Company pursuant to Section 77 of the Bankruptcy Act and under appointment by and orders of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, a court of [fol. 1145] competent jurisdiction, the trial court should not have rendered any judgment or entered any order other than that prayed for by said Appellant Trustee in his motion alternatively to dismiss this proceeding or to stay the same until Appellee had secured authority for the prosecution thereof from said United States District Court. (Germane to Appellant's First Point.)

II

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trial court had jurisdiction of the cause of action alleged by Appellee because it appeared that Appellant Trustee, at all times material to the matters complained of, was a carrier by railroad engaged in interstate commerce, and that a substantial part of the relief sought by Appellee was the fixation of compensation to be paid to it by Appellant Trustee for the use of the Appellee's tracks and facilities, it was fundamental error for the trial court to render any judgment other than a judgment of dismissal of this cause. (Germane to Appellant's Second Point.)

III

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trial court had jurisdiction of the cause of action alleged by the Appellee because, it appearing from the undisputed evidence that Appellant Trustee, at all times material to this case, was a carrier by railroad engaged in interstate commerce, that a substantial part of the relief sought by Appellee was the fixing of compensation to be paid to it by Appellant Trustee for

the use of the Appellee's tracks and facilities, and it being admitted that no certificate of public convenience and necessity had been sought or secured from the Interstate Commerce Commission fixing or approving the fair rate of such compensation or authorizing the abandonment of operations by Appellant Trustee, the trial court should not have rendered any judgment or entered any order other than one dismissing this proceeding. (Germane to Appellant's Third Point.)

[fol. 1146] IV

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trackage contract of 1904 could be lawfully cancelled or terminated without a certificate of public convenience and necessity having been issued by the Interstate Commerce Commission, authorizing abandonment of the Appellant Trustee's operations over the lines covered by said trackage contract because, the notice of termination, given by the Appellee under Article 12 of the trackage contract of 1904, did not have the effect of terminating that contract (which has remained and is still in force), because both the Appellee and Brownsville Company and the Brownsville Company and the Brownsville Company and the Appellant Trustee were and are carriers by railroad subject to the Interstate Commerce Act (and to Section 1(18) thereof), and no certificate of public convenience and necessity having been issued by the Interstate Commerce Commission authorizing abandonment of the Trustee's operations over the lines covered by the trackage contract, such operations could not lawfully be stopped or abandoned, nor the trackage contract (granting the right to conduct such operations) lawfully cancelled or terminated. If the trackage contract of 1904 is still in effect it alone is the measure of the compensation to be paid by the Trustee for his use of the properties covered thereby. (Germane to Appellant's Fourth Point.)

V

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that there was evidence sufficient to authorize the submission of Special Issue No. 1 by the trial court, because said Special Issue No. 1 inquired as to the value per day of the use made by the Appellants of the Appellee's property, and the only evidence introduced in

the case was as to the value of the total use of the Appellee's property, and the evidence further showed that all of said property was subjected to use by both Appellee and Appellants and a substantial part of it by a third carrier, and no evidence was introduced showing the quantum or proper- [fol. 1147] tionate part of the use which was made of the property, either by Appellee or Appellants or the third carrier, notwithstanding the fact that the record shows that such facts were exclusively within the knowledge of Appellee. (Germane to Appellant's Fifth Point.)

VI

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the Appellee did not ratify or recognize the existence of the contract of 1904 after its notice of termination because the undisputed proof showed that after the effective date of its purported notice to terminate the contract, Appellee, from November 1, 1941, down to and including the time of trial, continuously ratified such contract and recognized its continuing existence by voluntarily listing scheduled trains of Appellant Trustee upon its main line between Robstown and Corpus Christi in its published time cards or schedules, and by the issuing of clearances for such trains and special orders for the operation between Corpus Christi and Robstown by Appellant Trustee of other trains, and by such action had waived and recognized the invalidity of its purported notice to terminate the contract and by such conduct has admitted that the same remains in full force and effect. (Germane to Appellant's Sixth Point.)

VII

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that costs could properly be adjudged against the Appellant, Brownsville Railway, because it appeared from the face of the Appellee's petition, from the undisputed evidence and from the findings of fact of the trial court that Appellant Trustee operated under the frackage contract and supplement from the date of said Trustee's appointment and that exclusively Appellant Trustee has been making use of said property from and after November 1, 1941, and it was error for the trial court to enter any judgment as to Brownsville Company except a judgment

dismissing it with its costs. (Germane to Appellant's Seventh Point.)

[fol. 1148] VIII

The Honorable Court of Civil Appeals erred, to the prejudice of Appellants, because the findings of fact by the Honorable Court of Civil Appeals are insufficient to support its opinion on the Appellant's Fifth Point, and the Appellants, in addition to assigning the error above pointed out in Paragraph V hereof, respectfully request the Honorable Court of Civil Appeals to make and file conclusions of fact upon such point, pursuant to Rule 455, Texas Rules of Civil Procedure, for the reason that the findings of fact by the Court in connection with said point are wholly insufficient.

The Appellants respectfully request the Honorable Court of Civil Appeals to point out the evidence, if any, in the record from which the jury could have estimated, or calculated, or otherwise valued, the proportionate amount of use of Appellee's property by the three carriers operating thereon.

Conclusion

Appellants represent that the Attorneys for Appellee are Messrs. E. H. Borchers, of Laredo, Texas, B. D. Tarlton of Corpus Christi, Texas, M. G. Eckhardt of Corpus Christi, Texas, and J. D. Dodson of San Antonio, Texas, and that a copy of this motion has been mailed to each of them.

Wherefore, Appellants submit that this Court has erred, to the prejudice of Appellants, in the several respects set forth in the foregoing motion, and pray that the Court set aside its judgment rendered on the 31st day of May, 1944, and grant Appellants a rehearing, and that on such rehearing judgment be rendered by this Court reversing the judgment of the trial court and rendering judgment in favor of the Appellants, or, in the alternative, reversing the judgment of the trial court and remanding this cause for a new trial.

Respectfully submitted, E. H. Crenshaw, Jr., Kingsville, Texas; Andrews, Kelly, Kurth & Campbell, 2200 Gulf Building, Houston 2, Texas, by F. L. Andrews, Attorneys for Appellants.

[fol. 1149] [File endorsement omitted.]

[fol. 1150] In Court of Civil Appeals of Texas

[Tit omitted]

Order Overruling Motion for Rehearing—June 21, 1944

The motion of appellants, for rehearing, filed June 10, 1944, coming on to be heard, it is ordered that said motion be, and it is hereby, overruled; that appellants, The St. Louis, Brownsville & Mexico Railway Company and Guy A. Thompson, Trustee for the St. Louis, Brownsville & Mexico Railway Company, and surety, American General Insurance Company, pay all costs of this motion.

[fol. 1151] [File endorsement omitted]

In Supreme Court of Texas

Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor, and The St. Louis, Brownsville and Mexico Railway Company, Debtor, Petitioners,

v.

The Texas Mexican Railway Company, Respondent

Application for Writ of Error

To the Supreme Court of Texas:

The Petitioner, Guy A. Thompson, Trustee, hereinafter called Trustee, is the duly appointed and acting trustee in bankruptcy of the petitioner, The St. Louis, Brownsville and Mexico Railway Company, hereinafter called St. L. B. & M., having been appointed and acting as such trustee in reorganization proceedings in the District Court of the [fol. 1152] United States, Eastern District of Missouri, Eastern Division, pursuant to Section 77 of the Federal Bankruptcy Act.

Petitioners file this their application for a writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio in the case of The St. Louis, Brownsville and Mexico Railway Company, et al., Appellants, v. The Texas Mexican Railway Company, Appellee, Cause No. 11387, in said Court of Civil Appeals.

Statement of the Case

On November 1, 1904, St. L. B. & M. and Texas Mexican Railway Co., hereinafter called "Tex-Mex," entered into a fifty-year contract under which St. L. B. & M. for specified rentals, acquired the right to operate trains, engines and cars over that portion of the railway lines of Tex-Mex between Robstown and Corpus Christi and within the terminal limits of Corpus Christi. Tex-Mex, pursuant to a clause of the contract giving either party the right to cancel same on one year's notice, gave notice of its intention to terminate the contract effective November 1, 1941. On that date and at all times thereafter the properties of St. L. B. & M. were in custodia legis through the possession of the Trustee, who could not lawfully abandon such operations because no certificate of public convenience and necessity, permitting abandonment of petitioner's operations over the lines of Tex-Mex had been issued by the Interstate Commerce Commission.

The Respondent sued Petitioners in the District Court of Nueces County, Texas, to enjoin Petitioners' operations over its lines and for damages for petitioners' use of said lines of railroad, after November 1, 1941, or, in the alternative, the reasonable value of the use of the property after said date.

The trial court overruled pleas of the Trustee and the St. L. B. & M. (1) pointing out that such operations could not [fol. 1153] lawfully be discontinued by the Trustee in the absence of a certificate of public convenience and necessity by the Interstate Commerce Commission, authorizing abandonment of such operations, and (2) that the properties of the St. L. B. & M. were in custodia legis, being administered by the Trustee under directions of the Bankruptcy Court.

On the merits of the District Court entered judgment pursuant to an issue submitted to the jury, awarding Tex-Mex $184,929.85 as the value of the Trustee's use of the properties from November 1, 1941, to August 27, 1943, assessed costs jointly and severally against St. L. B. & M. and the Trustee, and held that the trackage contract of 1904 had been cancelled.

The Court of Civil Appeals in all things affirmed the judgment of the District Court.

The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following matters:

(1) The opinion of the Court of Civil Appeals does not make it clear that the primary purpose of this suit, as plead by Respondent, was to secure a permanent injunction preventing Petitioners from making any use of Respondent's property.

(2) The opinion of the Court of Civil Appeals concludes that there was sufficient evidence before the jury to permit it to find the value of the use of Respondent's property to the Trustee but does not make it clear that the Respondent's property was used jointly by Respondent and the Trustee and as to the Corpus Christi terminals, a third carrier, the T. & N. O. Ry. Co.; nor does said opinion show that the record was devoid of any evidence of the amount or proportion of use of such property by the three carriers involved; nor does it [fol. 1154] show that such information was peculiarly and exclusively within the knowledge of Respondent.

(3) The opinion states that "The Texas & New Orleans Railway Company apparently made some limited use of the Tex-Mex Corpus Christi yards." The use referred to was not a limited use but was the full and equal use of a part of the property which on Respondent's own testimony represented approximately 63% of the total value of Respondent's property.

Grounds of Jurisdiction of the Supreme Court

The Supreme Court has jurisdiction of this case under Subdivision 6 of Article 1728.

Points of Error

First Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trial court had jurisdiction of the cause of action alleged by the Appellee because, it appearing from the Appellee's pleadings, admissions, and the undisputed evidence that Appellant Trustee, on and at all times subsequent to October 28, 1940, was operating the properties of the St. Louis, Brownsville and Mexico Rail-

way Company pursuant to Section 77 of the Bankruptcy Act and under appointment by and orders of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, a court of competent jurisdiction, the trial court should not have rendered any judgment or entered any order other than that prayed for by said Appellant Trustee in his motion alternatively [fol. 1155] to dismiss this proceeding or to stay the same until Appellee had secured authority for the prosecution thereof from said United States District Court. (Germane to Appellant's First Assignment of Error in Motion for Rehearing.)

Second Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trial court had jurisdiction of the cause of action alleged by Appellee because it appeared that Appellant Trustee, at all times material to the matters complained of, was a carrier by railroad engaged in interstate commerce, and that a substantial part of the relief sought by Appellee was the fixation of compensation to be paid to it by Appellant Trustee for the use of the Appellee's tracks and facilities, it was fundamental error for the trial court to render any judgment other than a judgment of dismissal of this cause. (Germane to Appellant's Second Assignment of Error in Motion for Rehearing.)

Third Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trial court had jurisdiction of the cause of action alleged by the Appellee because, it appearing from the undisputed evidence that Appellant Trustee, at all times material to this case, was a carrier by railroad engaged in interstate commerce, that a substantial part of the relief sought by Appellee was the fixing of compensation to be paid to it by Appellant Trustee for the use of the Appellee's tracks and facilities, and it being admitted that no certificate of public convenience and neces- [fol. 1156] sity had been sought or secured from the Interstate Commerce Commission fixing or approving the fair rate of such compensation or authorizing the abandonment of operations by Appellant Trustee, the trial court should not have rendered any judgment or entered any order other

than one dismissing this proceeding. (Germane to Appellant's Third Assignment of Error in Motion for Rehearing.)

Fourth Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trackage contract of 1904 could be lawfully cancelled or terminated without a certificate of public convenience and necessity having been issued by the Interstate Commerce Commission, authorizing abandonment of the Appellant Trustee's operations over the lines covered by said trackage contract because, the notice of termination, given by the Appellee under Article 12 of the Trackage Contract of 1904, did not have the effect of terminating that contract (which has remained and is still in force), because both the Appellee and Brownsville Company and the Appellant Trustee were and are carriers by railroad subject to the Interstate Commerce Act (and to Section 1(18) thereof); and no certificate of public convenience and necessity having been issued by the Interstate Commerce Commission authorizing abandonment of the Trustee's operations over the lines covered by the trackage contract, such operations could not lawfully be stopped or abandoned, nor the trackage contract (granting the right to conduct such operations) lawfully cancelled or terminated. If the Trackage Contract of 1904 is still in effect it alone is the measure of the compensation to be [illegible] paid by the Trustee for his use of the properties covered thereby. (Germane to Appellant's Fourth Assignment of Error in Motion for Rehearing.)

Fifth Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that there was evidence sufficient to authorize the submission of Special Issue No. 1 by the trial court because said Special Issue No. 1 inquired as to the value per day of the use made by the Appellants of the Appellee's property, and the only evidence introduced in the case was as to the value of the total use of the Appellee's property, and the evidence further showed that all of said property was subjected to use by both Appellee and Appellants and a substantial part of it by a third carrier, and no evidence was introduced showing the quantum or proportionate part of the use which was made of the prop-

erty, either by Appellee or Appellants or the third carrier, notwithstanding the fact that the record shows that such facts were exclusively within the knowledge of Appellee. (Germane to Appellant's Fifth Assignment of Error in Motion for Rehearing.)

Sixth Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the Appellee did not ratify or recognize the existence of the Contract of 1904 after its notice of termination because the undisputed proof showed that after the effective date of its purported notice to terminate the contract, Appellee, from November 1, 1941, down to and including the time of trial, continuously ratified such [fol. 1158] contract and recognized its continuing existence by voluntarily listing scheduled trains of Appellant Trustee upon its main line between Robstown and Corpus Christi in its published time cards or schedules, and by the issuing of clearances for such trains and special orders for the operation between Corpus Christi and Robstown by Appellant Trustee of other trains, and by such action had waived and recognized the invalidity of its purported notice to terminate the contract and by such conduct has admitted that the same remains in full force and effect. (Germane to Appellant's Sixth Assignment of Error in Motion for Rehearing.)

Seventh Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that costs could properly be adjudged against the Appellant, Brownsville Railway, because it appeared from the face of the Appellee's petition, from the undisputed evidence and from the findings of fact of the trial court that Appellant Trustee operated under the Trackage Contract and Supplement from the date of said Trustee's appointment and that exclusively Appellant Trustee has been making use of said property from and after November 1, 1941, and it was error for the trial court to enter any judgment as to Brownsville Company except a judgment dismissing it with its costs. (Germane to Appellant's Seventh Assignment of Error in Motion for Rehearing.)

Eighth Point

The Court of Civil Appeals erred, to the prejudice of Appellants, because the findings of fact by the Court [fol. 1158½] of Civil Appeals are insufficient to support its opinion that there was evidence to warrant the submission of Special Issue No. 1, complained of in Appellant's Point Five, and the Court of Civil Appeals erred in failing to make and file conclusions of fact upon such point, pursuant to Rule 455, Texas Rules of Civil Procedure. (Germane to Appellant's Eighth Assignment of Error in Motion for Rehearing and to Appellant's Motion requesting the Court of Civil Appeals to make and file conclusions of fact.)

[fol. 1159] Conclusion

Petitioners respectfully submit (1) that the trial court was wholly without jurisdiction of this cause; that therefore its judgment and the judgment of the Court of Civil Appeals should be reversed and judgment here rendered in favor of Petitioners; (2) even if the trial court had jurisdiction, the errors committed by the trial court and the Court of Civil Appeals are such that its judgment and the judgment of the Court of Civil Appeals should be reversed and judgment here rendered in favor of Petitioner; and (3) that even if judgment should not be here rendered in favor of Petitioners, the case should, because of the errors committed by the trial court and the Court of Civil Appeals, be re- [fol. 1159½] versed and remanded for a new trial, and for such other or different relief or further proceedings as the ends of justice demand.

Respectfully submitted, E. H. Crenshaw, Jr., Kingsville, Texas; R. H. Kelley, F. L. Andrews, Andrews, Kelley, Kurth & Campbell, 2200 Gulf Building, Houston 2, Texas. By R. H. Kelley, Attorneys for Petitioners.

[fol. 1160] Clerk's Office

Supreme Court of Texas

I, Geo. H. Templin, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing, on eleven pages, are true and correct copies of pages 8 and the first

ten lines on page 9, and of the last thirteen lines on page 44 and all of page 45, of the application for writ of error in the case of Guy A. Thompson, Trustee, etc, et al, Petitioners, vs. The Texas Mexican Railway Company, Respondent, No. A-289, from Nueces County, 4th District, as said pages and parts of pages appear in the original application for writ of error on file in my office.

In testimony whereof, witness my hand and the seal of the Supreme Court of Texas, this the 23rd day of January, 1945.

Geo. H. Templin, Clerk, by J. P. Byrne, Deputy.
(Seal.)

[fol. 1161] In Court of Civil Appeals of Texas

[Title omitted]

Stipulation—Filed January 22, 1945

It is agreed by and between counsel of record for the respective parties in the above styled and numbered cause that the Clerk of the Court of Civil Appeals, in making up the record to be filed in the Supreme Court of the United States in connection with Appellants' Petition for Writ of Certiorari, may omit from the record that part of Appellants' Application for Writ of Error in the Supreme Court of Texas which consists of argument, same commencing with original page 9 and ending on original page 44 of said application for writ of error.

Dated this 22 day of January, A. D. 1945.

(Signed) Andrews, Kelley, Kurth & Campbell By F. L. Andrews, Attorneys for Appellants.

(Signed) J. D. Dodson, J. D. Dodson, Attorney for the Appellee.

[File endorsement omitted.]

[fol. 1162] IN SUPREME COURT OF TEXAS

From Nueces County, 4th Dist.

No. A-289

GUY A. THOMPSON, Trustee,

vs.

THE TEXAS MEXICAN RY. CO.

November 1, 1944

JUDGMENT REFUSING APPLICATION FOR WRIT OF ERROR

This day came on to be heard the application of Petitioner for a writ of error to the Court of Civil Appeals for the Fourth District, and the same having been duly considered, it is ordered that the application be refused; that applicant, Guy A. Thompson, Trustee, and Surety, American General Insurance Company, pay all costs incurred on this application.

IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING

November 29, 1944

The motion for rehearing filed herein by Petitioner having heretofore been submitted to the Court, and the same having been duly considered, it is ordered that the said motion be, and is hereby, overruled.

[fol. 1162a] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 1162b] [File endorsement omitted.]

[fol. 1163] IN SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING ON THE ORDER OF THE COURT REFUSING THE APPLICATION FOR WRIT OF ERROR—Filed November 15, 1944

To the Honorable Supreme Court of Texas:

Come now Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor, and The St. Louis, Brownsville and Mexico Railway Company, Debtor, Petitioners, in the above styled and numbered cause, and file this their Motion for Rehearing on the Order of the Court refusing the Application for Writ of Error heretofore filed by Petitioners in this cause, and for such Motion for Rehearing would show to the Court that The Supreme Court has erred, in not granting Petitioners' Application for Writ of Error upon each of the following Points of Error:

First Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trial court had jurisdiction [fol. 1164] of the cause of action alleged by the Appellee because, it appearing from the Appellee's pleadings, admissions, and the undisputed evidence that Appellant Trustee, on and at all times subsequent to October 28, 1940, was operating the properties of the St. Louis, Brownsville and Mexico Railway Company pursuant to Section 77 of the Bankruptcy Act and under appointment by and orders of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri a court of competent jurisdiction, the trial court should not have rendered any judgment or entered any order other than that prayed for by said Appellant Trustee in his motion alternatively to dismiss this proceeding or to stay the same until Appellee had secured authority for the prosecution thereof from said United States District Court. (Germane to Appellant's First Assignment of Error in Motion for Rehearing.)

Second Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trial court had jurisdiction of the cause of action alleged by Appellee because it ap-

peared that Appellant Trustee, at all times material to the matters complained of, was a carrier by railroad engaged in interstate commerce, and that a substantial part of the relief sought by Appellee was the fixation of compensation to be paid to it by Appellant Trustee for the use of the Appellee's tracks and facilities, it was fundamental error for the trial court to render any judgment other than a judgment of dismissal of this cause." (Germane to Appellant's Second Assignment of Error in Motion for Rehearing.)

[fol. 1165] Third Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trial court had jurisdiction of the cause of action alleged by the Appellee because, it appearing from the undisputed evidence that Appellant Trustee, at all times material to this case, was a carrier by railroad engaged in interstate commerce, that a substantial part of the relief sought by Appellee was the fixing of compensation to be paid to it by Appellant Trustee for the use of the Appellee's tracks and facilities, and it being admitted that no certificate of public convenience and necessity had been sought or secured from the Interstate Commerce Commission fixing or approving the fair rate of such compensation or authorizing the abandonment of operations by Appellant Trustee, the trial court should not have rendered any judgment or entered any order other than one dismissing this proceeding. (Germane to Appellant's Third Assignment of Error in Motion for Rehearing.)

Fourth Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the trackage contract of 1904 could be lawfully cancelled or terminated without a certificate of public convenience and necessity having been issued by the Interstate Commerce Commission, authorizing abandonment of the Appellant Trustee's operations over the lines covered by said trackage contract because, the notice of termination, given by the Appellee under Article 13 of the Trackage Contract of 1904, did not have the effect of terminating that contract (which has remained and is still in force), because both the Appellee and Brownsville Company and the Appellant Trustee were

[fol. 1166]

and are carriers by railroad subject to the Interstate Commerce Act (and to Section 1(18) thereof), and no certificate of public convenience and necessity having been issued by the Interstate Commerce Commission authorizing abandonment of the Trustee's operations over the lines covered by the trackage contract, such operations could not lawfully be stopped or abandoned, nor the trackage contract (granting the right to conduct such operations) lawfully cancelled or terminated. If the Trackage Contract of 1904 is still in effect it alone is the measure of the compensation to be paid by the Trustee for his use of the properties covered thereby. (Germane to Appellant's Fourth Assignment of Error in Motion for Rehearing.)

Fifth Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that there was evidence sufficient to authorize the submission of Special Issue No. 1 by the trial court because said Special Issue No. 1 inquired as to the value per day of the use made by the Appellants of the Appellee's property, and the only evidence introduced in the case was as to the value of the total use of the Appellee's property, and the evidence further showed that all of said property was subjected to use by both Appellee and Appellants and a substantial part of it by a third carrier, and no evidence was introduced showing the quantum or proportionate part of the use which was made of the property, either by Appellee, or Appellants or the third carrier, not- [fol. 1167] withstanding the fact that the record shows that such facts were exclusively within the knowledge of Appellee. (Germane to Appellant's Fifth Assignment of Error in Motion for Rehearing.)

Sixth Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that the Appellee did not ratify or recognize the existence of the Contract of 1904 after its notice of termination because the undisputed proof showed that after the effective date of its purported notice to terminate the contract, Appellee, from November 1, 1941, down to and including the time of trial, continuously ratified such contract and recognized its continuing existence by voluntarily listing scheduled trains of Appellant Trustee upon its main

line between Robstown and Corpus Christi in its published time cards or schedules, and by the issuing of clearances for such trains and special orders for the operations between Corpus Christi and Robstown by Appellant Trustee of other trains, and by such action had waived and recognized the invalidity of its purported notice to terminate the contract and by such conduct has admitted that the same remains in full force and effect. (Germane to Appellant's Sixth Assignment of Error in Motion for Rehearing.)

Seventh Point

The Court of Civil Appeals erred, to the prejudice of Appellants, in holding that costs could properly be adjudged against the Appellant, Brownsville Railway, because it appeared from the face of the Appellee's petition, from the [fol. 1168] undisputed evidence and from the findings of fact of the trial court that Appellant Trustee operated under the Trackage Contract and Supplement from the date of said Trustee's appointment and that exclusively Appellant Trustee has been making use of said property from and after November 1, 1941, and it was error for the trial court to enter any judgment as to Brownsville Company except a judgment dismissing it with its costs. (Germane to Appellant's Seventh Assignment of Error in Motion for Rehearing.)

Eighth Point

The Court of Civil Appeals erred, to the prejudice of Appellants, because the findings of fact by the Court of Civil Appeals are insufficient to support its opinion that there was evidence to warrant the submission of Special Issue No. 1 complained of in Appellant's Point Five, and the Court of Civil Appeals erred in failing to make and file conclusions of fact upon such point, pursuant to Rule 455, Texas Rules of Civil Procedure. (Germane to Appellant's Eighth Assignment of Error in Motion for Rehearing and to Appellant's Motion requesting the Court of Civil Appeals to make and file conclusions of fact.)

The names and residences of the counsel for the opposing party are as follows:

E. H. Borchers, Laredo, Texas;
M. G. Eckhardt, Corpus Christi, Texas;
J. D. Dodson, San Antonio, Texas;
B. D. Tarlton, Corpus Christi, Texas;

and a copy of this Motion for Rehearing, together with [fol. 1169] the argument filed in support hereof has been mailed to each of the attorneys of record for Respondent.

Respectfully submitted, Andrews, Kelley, Kurth & Campbell, R. H. Kelley, F. L. Andrews, 2200 Gulf Building, Houston 2, Texas; E. H. Crenshaw, Jr., Kingsville, Texas, Attorneys for Petitioners.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 1170] In Court of Civil Appeals of Texas

[Title omitted]

Motion for Stay of Mandate—Filed December 16, 1944

To the Honorable Court of Civil Appeals for the Fourth Supreme Judicial District of Texas and the Judges thereof:

Now comes the St. Louis, Brownsville and Mexico Railway Company, Debtor, and Guy A. Thompson, Trustee, the St. Louis, Brownsville and Mexico Railway Company, Debtor and respectfully represent:

I

That within the time prescribed by law they intend to apply, jointly and severally, to the Supreme Court of the United States for a Writ of Certiorari to review the judgment of this Court rendered herein on May 31, 1944.

II

That application is being made to the Clerk of this Court for a certification of the record to be used in connection with such application for certiorari.

Wherefore, Appellants jointly and severally move that the issuance of the mandate of this court be stayed until their applications for Writ of Certiorari shall be filed and disposed of, and for such other orders as may be appropriate in the premises.

E. H. Crenshaw, Jr., Kingsville, Texas; Andrews, Kelley, Kurth & Campbell, 2200 Gulf Building, Houston 2, Texas, by F. L. Andrews, Attorneys for Appellants.

[fol. 1171] [File endorsement omitted.]

[fol. 1172] IN COURT OF CIVIL APPEALS OF TEXAS

ORDER STAYING MANDATE—December 20, 1944

[Title omitted]

The motion of appellants to stay mandate, filed December 16, 1944, coming on to be heard, it is ordered that said motion be, and it is hereby, granted; that appellants, The St. Louis, Brownsville & Mexican Railway Company and Guy A. Thompson, Trustee for the St. Louis, Brownsville & Mexico Railway Company, and surety, American General Insurance Company, pay all costs of this motion.

[fol. 1173] IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed January 22, 1945

The Appellants in the above styled and numbered cause, Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, and The St. Louis, Brownsville and Mexico Railway Company, are filing in the Supreme Court of the United States a Petition for Writ of Certiorari and desire that you prepare and certify the record in said cause for filing in the Supreme Court of the United States, said record to consist of the following:

1. Transcript of Record.
2. Statement of Facts.
3. Points of Error in Apellants' Brief in the Court of Civil Appeals (Original pages 3 to 6 inclusive).
4. Opinion of the Court of Civil Appeals.
5. Judgment of the Court of Civil Appeals.
6. Appellants' Motion for Rehearing in the Court of Civil Appeals.
7. Order of Court of Civil Appeals Overuling Appellants' Motion for Rehearing.
8. Application for Writ of Error, Supreme Court of Texas, omitting argument (original pages 9 to 44, but including hearing and statement of the case, grounds of jurisdiction, points of error—original pages 1 to 9 inclusive, and conclusion—pages 44 and 45);

9. Stipulation of counsel with respect to omission of argument in Application for Writ of Error.

10. Order of Supreme Court of Texas refusing Application for Writ of Error.

11. Petitioner's Motion for Rehearing of Application for Writ of Error in Supreme Court of Texas.

12. Order of the Supreme Court of Texas denying Petitioners' Motion for Rehearing.

13. Appellants' Motion to Stay Mandate in the Court of Civil Appeals.

14. Order of Court of Civil Appeals Staying Mandate.

[fol. 1174] 15. This Praecipe.

Dated this 22 day of January, A. D. 1945.

Andrews, Kelley, Kurth & Campbell, by F. L. Andrews, Attorneys for Appellants, 2200 Gulf Building, Houston 2, Texas.

Service of a copy of the foregoing Praecipe, this 22 day of January, 1945, is hereby acknowledged.

J. D. Dodson, Attorney for Appellee.

[File endorsement omitted.]

[fols. 1175-1176] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1177] In Supreme Court of the United States

Stipulation as to Printed Record

It is stipulated by and between the parties to the above styled cause, pursuant to Rule 38 of the Rules of the Supreme Court of the United States, that the following matters appearing in the record of the case as prepared by the Clerk of the Court of Civil Appeals may be omitted from the printed record to be prepared by the Clerk of the Supreme Court of the United States:

From page 303, line 9 to and including page 1128.

It is also stipulated that Appellants will not, in the Supreme Court, raise any questions beyond the following:

(a) Jurisdiction of the trial court;

(b) Exclusive jurisdiction of the Court of Bankruptcy;

(c) Exclusive jurisdiction of the Interstate Commerce Commission to fix compensation for use of trackage;

(d) Inability of Respondent to lawfully or successfully cancel the trackage contract of 1904, as amended in 1914, in the absence of a certificate of public convenience and [fol. 1178] necessity by the Interstate Commerce Commission permitting the abandonment of the Trustee's operations on the lines covered by the trackage contract.

Dated this 2nd day of February, A. D. 1945.

Andrews, Kelley, Kurth & Campbell, by Robert H. Kelley, Attorneys for Appellants. J. D. Dodson, Attorney for Appellee.

[fol. 1179] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 23, 1945

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, Fourth Supreme Judicial District is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 221]

STIPULATION AND ADDITION TO RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 42

GUY A. THOMPSON, Trustee, THE ST. LOUIS, BROWNSVILLE & MEXICO Railway Company, Debtor, and the St. Louis, Brownsville & Mexico Railway Company, Petitioners,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY

It is stipulated by and between the parties to the above styled and numbered cause that the attached copy of an order of The Supreme Court of Texas made September 11, 1945, certified to under the hand and seal of the Clerk of Supreme Court of the State of Texas, and marked Exhibit A," together with certified copy of entries upon minutes of said The Supreme Court of the State of as, also certified to under the hand and seal of the Clerk he Supreme Court of the State of Texas, hereto at- ed and marked "Exhibit B," shall be added to the rec- l on file in the Supreme Court.

Dated this 24th day of September, 1945.

Robert H. Kelley, Attorney for Petitioners, Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor, and The St. Louis, Brownsville and Mexico Railway Company; ——, Attorney for The Texas Mexican Railway Company.

[fol. 222] Exhibit A

No. A-289

In the Supreme Court of Texas

Guy A. Thompson, Trustee, The St. Louis, Br
Mexico Railway Company, Debtor, and th
Brownsville & Mexico Railway Company, P
tioners,

vs.

The Texas Mexican Railway Company, Re

On Motion of the St. Louis, Brownsville
Railway Company, it appearing to the Court t

On July 31, 1944, an application for a writ o
Court of Civil Appeals for the Fourth Supr
District of Texas, at San Antonio, was filed
cause by Guy A. Thompson, Trustee, The St. Lo
ville and Mexico Railway Company, Debtor,
St. Louis, Brownsville and Mexico Railway C
November 1, 1944, as shown by the Court's
said application for writ of error was refu
vember 15, 1944, a motion for rehearing of
tion for writ of error was filed by the same
on November 29, 1944, said motion for reh
also shown by said docket, was by the Court
By reason of a clerical error committed
the Court's minutes, such minutes do not c
that the application for writ of error was
the motion for rehearing overruled as to th

It is Ordered that the Clerk of this Court is
ordered to correct the minutes of the Court
rectly the judgment of this Court of Nove
refusing the said application for writ of err
applicant, and (b) the judgment of this Cou
ber 29, 1944 overruling the said motion for
to each applicant.

September 11, 1945.

James P. Alexander, Chief Justice; Jo
Associate Justice; Gordon Simpso
Justice.

[fol. 223] Clerk's Office—Supreme Court of Texas

I, Geo. H. Templin, Clerk of the Supreme Court of the State of Texas, do hereby certify that the foregoing one page contains a true and correct copy of the Order of this Court commanding the Clerk to correct the minutes to show that the application for writ of error in cause No. A-289 was filed by both applicants, to-wit: Guy A. Thompson, Trustee, The St. Louis, Brownsville & Mexico Railway Company, Debtor, and also The St. Louis, Brownsville & Mexico Railway Company, and that said application was refused and the motion for rehearing was overruled as to each applicant.

In Testimony Whereof, Witness my hand and the seal of the Supreme Court of Texas, at Austin, this the 11th day of September, 1945.

Geo. H. Templin, Clerk of the Supreme Court of the State of Texas. (Seal.)

[fol. 224] Exhibit B

September 11, 1945

No. A-289

Guy A. Thompson, Trustee, The St. Louis, Brownsville & Mexico Railway Company, and the St. Louis, Brownsville & Mexico Railway Company, Petitioners

vs.

The Texas Mexican Railway Company, Respondent

Nueces County, Fourth District

On this day coming on to be heard the motion of petitioners, Guy Thompson, Trustee of the St. Louis, Brownsville & Mexico Railway Company, and the St. Louis, Brownsville & Mexico Railway Company, to correct the judgment entered in the minutes of the Supreme Court in the above styled and numbered cause on November 1, 1944, refusing the application for writ of error by said petitioners, and to correct the order entered by the Supreme Court on November 29, 1944, overruling the motion for rehearing filed by petitioners in the above styled and num-

bered cause, and the same having been duly considered, and the Court being of the opinion that the said motion should be granted, it is Ordered, Adjudged and Decreed that the judgment entered on November 1, 1944, refusing the application for writ of error in the above styled and numbered cause, be, and the same is hereby, corrected to truly reflect the action of the Court upon said application, and the following judgment be entered in lieu of the judgment entered in said cause on November 1, 1944, to-wit:

No. A-289

November 1, 1944

GUY A. THOMPSON, Trustee, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, and the St. Louis, Brownsville & Mexico Railway Company, Petitioners,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY, Respondent

FROM NUECE'S COUNTY, FOURTH DISTRICT

This day came on to be heard the application of Petitioners, for a writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District, and the same having been duly considered, it is ordered that the applica- [fol. 225] tion be refused; that the applicants, Guy A. Thompson, Trustee of the St. Louis, Brownsville & Mexico Railway Company, and surety, American General Insurance Company, and the St. Louis, Brownsville & Mexico Railway Company, pay all costs incurred on this application.

It is further ordered that the minutes of this Court of date, November 29th, 1944, overruling the motion for rehearing filed by petitioners, be corrected, and the following order be entered in said cause in lieu thereof, to-wit:

No. A-289

November 29, 1944

(On Rehearing)

GUY A. THOMPSON, Trustee, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY; Debtor, and the St. Louis, Brownsville & Mexico Railway Company, Petitioners,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY, Respondent

FROM NUECE'S COUNTY, FOURTH DISTRICT

The motion for rehearing filed herein by the Petitioners having heretofore been submitted to the Court, and the same having been duly considered, it is ordered that the said motion be, and is hereby, overruled.

[fol. 226] CLERK'S OFFICE—SUPREME COURT OF TEXAS

I, Geo. H. Templin, Clerk of the Supreme Court of the State of Texas, do hereby certify that the foregoing two pages contain a true and correct copy of the Order of this Court granting the motion to correct the minutes to truly reflect the action of the Court in refusing the application for writ of error filed herein by both Petitioners, Guy A. Thompson, Trustee of St. Louis, Brownsville & Mexico Railway Company, and The St. Louis, Brownsville & Mexico Railway Company, as well as the judgment of the Court overruling the motion for rehearing filed by said Petitioners, as the same appear of record in the minutes on the respective dates.

In Testimony Whereof, Witness my hand and seal of Court, at Austin, this 11th day of September, 1945.

Geo. H. Templin, Clerk of the Supreme Court of the State of Texas. (Seal.)

Page

Ex Parte Baldwin, 291 U. S. 610 ..... 2, 19, 22
Illinois Steel Co. v. *Baltimore & Ohio Railroad Co.*, 320 U. S. 508 12
In Re Chicago & E. I. Ry. Co., 124 F. (2d) 785 26
Isaacs v. *Hobbs Tie & Timber Co.*, 282 U. S. 734 18
Jennings v. *Public Utility Commission*, 14 Atl. (2d) 882 27
Louisville & Nashville R. Co. v. *Mottley*, 219 U. S. 467 30
Palmer v. *Larchmont Manor Co.*, 30 N. E. (2d) 599; 284 N. Y. 288 21
Palmer v. *Massachusetts*, 308 U. S. 79 34
Taylor v. *Santa Fe, etc.*, 38 N. M. 457; 34 Pac. (2d) 1102 30
Texas & Pacific Railway Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 ..... 38, 39
The St. Louis, B. & M. Ry. Co. v. *Brownsville, etc. Dist.*, 304 U. S. 295 2
Transit Commission, et al. v. *United States*, 289 U. S. 121 36
Warren v. *Palmer*, 310 U. S. 132 ..... 23, 29

STATUTES CITED

Texas Rules of Civil Procedure, Rule 483 4
28 U. S. C. Sec. 344(b) (Judicial Code, Sec. 237(b)) 4, 11
11 U. S. A. Sec. 205(a) (Bankruptcy Act, Sec. 77(a)) 35
11 U. S. C. Sec. 205(c)(2) (Bankruptcy Act, Sec. 77(c)(2)) 17
11 U. S. C. Sec. 205(j) (Bankruptcy Act, Sec. 77(j)) 24
11 U. S. C. Sec. 205(o) (Bankruptcy Act, Sec. 77(o)) 35
49 U. S. C. Sec. 1(18) (Interstate Commerce Act, Sec. 1(18)) 2
49 U. S. C. Sec. 1(20) (Interstate Commerce Act, Sec. 1(20)) 29

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1000

GUY A. THOMPSON, TRUSTEE; THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR; AND THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY,

Petitioners,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

The joint and several petition of Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor, hereinafter sometimes called "Trustee", and The St. Louis, Brownsville and Mexico Railway Company, hereinafter sometimes called "St. L. B. & M." respectfully shows:

1. On November 1, 1904, St. L. B. & M. and Respondent, The Texas Mexican Railway Company, hereinafter some-

times called "Tex-Mex"; each being an interstate carrier by rail, entered into a contract, whereby Tex-Mex granted to St. L. B. & M., for specified rentals, the right to operate trains, engines and cars over that part of the Tex-Mex line of railway between Robstown, Texas, and Corpus Christi, Texas, including the terminals at the latter city (R. 137). The contract was amended in 1914 in certain respects not here material. Relying on a clause of the contract giving either party the right to cancel same on one year's notice, Tex-Mex, prior to November 1, 1940, gave notice of its intention to terminate the contract, effective November 1, 1941 (R. 157). Since 1933, and at all times material hereto, the properties of St. L. B. & M. have been and now are in *custodia legis* (see *Ex Parte Baldwin*, 291 U. S. 610, *The St. Louis, B. & M. Ry. Co.* v. *Brownsville, etc. Dist.*, 304 U. S. 295), in the possession of the Trustee or his predecessors in office, duly appointed, qualified and acting under the orders of the court of bankruptcy, the United States District Court for the Eastern Division, Eastern District of Missouri, in a matter then and now pending before said court, entitled "In the Matter of Missouri Pacific Railroad Company, Debtor," No. 6935, on the Bankruptcy Docket of said court (R. 36-7).

2. No certificate of public convenience and necessity has been issued by the Interstate Commerce Commission permitting the abandonment of the Trustee's operations over Respondent's line of railway from Robstown to Corpus Christi, as required by Section 1(18) of the Interstate Commerce Act,[1] as amended, 24 Stat. 397, 41 Stat. 474, Act of February 28, 1920 (R. 12, 13, 175-185).

[1] "* * * No carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *"

3. Tex-Mex, on May 25, 1942, sued Petitioners in the District Court of Nueces County, Texas, to enjoin Petitioners from operating over the line of railway involved, and to recover damages for Petitioners' use of said line after November 1, 1941 (Plaintiff's First Amended Original Petition, on which trial was had (R. 36-47)).

4. Petitioners, by pleas to the jurisdiction, and by answer raised the questions set out in paragraph 10, infra, pleading the facts: (a) that the property of the St. L. B. & M. were in custodia legis, being administered by the Trustee under orders of the Court of Bankruptcy (R. 48, 56); (b) that the stay orders entered by the Court of Bankruptcy prevented prosecution of this suit; (c) that because of his engagement in interstate commerce, the Trustee's operations over the line of railway involved could not lawfully be abandoned or discontinued by the Trustee in the absence of a certificate of public convenience and necessity by the Interstate Commerce Commission, permitting such abandonment (R. 1, 4); wherefore, the contract granting the right to conduct such operations could not be terminated; and (d) that because of the same interstate operations, the State court was not competent to fix the proper compensation for the use of the trackage involved.

5. The District Court, after hearing evidence (R. 103-185), overruled the pleas to its jurisdiction (R. 69), tried the case on the merits, and, pursuant to a verdict purporting to find the value of the Trustee's use of Respondent's properties, entered judgment, awarding $184,929.85 damages to Respondent against the Trustee for such use from November 1, 1941 to August 27, 1943, and assessing costs jointly and severally against Petitioners. The trial court further adjudged that the contract of 1904 could be and had been cancelled and terminated, notwithstanding the absence of a certificate of public convenience and necessity

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944

No. 1000

Y. A. THOMPSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY,

Petitioners,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY

TITION FOR WRIT OF CERTIORARI TO THE OURT OF CIVIL APPEALS, FOURTH SUPREME UDICIAL DISTRICT, STATE OF TEXAS, AND UPPORTING BRIEF.

E. H. CRENSHAW, JR.,
ROBERT H. KELLEY,
F. L. ANDREWS,
Counsel for Petitioners

INDEX

Subject Matter

	Page
Petition for certiorari	1
Brief in support of petition for certiorari	11
Grounds of jurisdiction	11
Statement of the case	12
Specification of errors	16
Argument	17
Point I—Exclusive jurisdiction of the subject matter of this suit is vested in the Court of Bankruptcy	17
Point II—The stay orders entered in the Court of Bankruptcy prohibit prosecution of this suit in the State Court	24
Point III—The trackage contract here involved cannot be lawfully cancelled or terminated in the absence of a certificate of convenience and necessity issued by the Interstate Commerce Commission permitting the abandonment of Petitioners' operations authorized and conducted under the trackage contract	28
Point IV—Exclusive jurisdiction to determine the fair rental or compensation for the use by one interstate carrier of a line of railway owned by another interstate carrier is vested exclusively in the Interstate Commerce Commission	34
Conclusion and prayer	40

Cases Cited

Atchison, etc. Ry. Co. v. *Railroad Commission*, 283 U. S. 380	33
Bacon v. *Texas*, 163 U. S. 207	4, 12
Brown v. *Gerdes*, 321 U. S. 178	12
Continental Bank & Trust Co. v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648	19
Eldridge v. *Black & White River Valley Ry. Co.*, 109 S. W. (2d) 658	27

by the Interstate Commerce Commission permitting the Trustee to abandon his operations (R. 85). The court did not grant the injunction sought by Respondents but if did assume jurisdiction over that question.

6. Petitioners perfected an appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, which in all things affirmed the judgment of the District Court (R. 199) Opinion (R. 189-198).

7. Petitioners applied to the Supreme Court of Texas for a Writ of Error and this was refused by said Court (no opinion) (R. 212), which overruled Petitioners' Motion for Rehearing on November 29, 1944 (R. 212). Under the law of Texas, the effect of the order of the Supreme Court of Texas refusing Petitioners' Application for Writ of Error is to make the judgment of the Court of Civil Appeals final and to approve the principles of law declared in that Court's opinion. *Texas Rules of Civil Procedure*, Rule 483.[2] The Court of Civil Appeals thus became, in this case, the highest Court of the State in which a decision could be had. See *Bacon* v. *Texas*, 163 U. S. 207.

8. Petitioners have at all times recognized the validity of the contract of 1904 and have offered to pay all sums due under the contract and still stand ready and willing to pay such sums (R. 23).

9. Jurisdiction of the Supreme Court of the United States is invoked pursuant to Judicial Code, Sec. 237(b), as amended by the Act of February 13, 1925, 28 U. S. C. Sec. 344b, 43 Stat. 937, reading in part:

---

[2] "Rule 483. Order on Application for Writ of Error.
In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation, 'Refused.'"

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; * * *; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

10. Petitioners' pleas to the jurisdiction of the trial court raised four questions involving the proper interpretation of, and titles, rights, privileges and immunities claimed under statutes of the United States, each decided adversely to Petitioners in the highest court of the State of Texas (Court of Civil Appeals), in which a decision could be had:

(a) Whether, in view of the provisions of Sec. 77 of the Bankruptcy Act, reading in part as follows:

"If the petition is so approved, the court in which such order is entered shall during the pendency of the proceedings under this section and for the purpose thereof, have exclusive jurisdiction of the debtor and its property, wherever located * * *," (11 U. S. C. Sec. 205a, as amended 47 Stat. 1474, 49 Stat. 911, 53 Stat. 406),

exclusive jurisdiction of a suit of this character against the trustee and debtor, to restrain their operations, to diminish the extent of the property subject to their control, and to recover damages, is vested in the court of bankruptcy;

(b) Whether the stay orders issued by the court of bankruptcy (R. 120, 124) prohibited the prosecution of this suit elsewhere than in the court of bankruptcy;

(c) Whether, in view of Section 1(18) of the Interstate Commerce Act, the trackage contract of 1904, expressly granting the right to operate over the line in question, could be lawfully or sucessfully terminated without the Interstate Commerce Commission having first issued a certificate of public convenience and necessity, permitting abandonment of the operations authorized by and subsequently conducted under said contract;

(d) Whether, in view of Section 1(18)-(20) and other provisions of the Interstate Commerce Act, exclusive jurisdiction to determine a fair rental or compensation for the use by an interstate carrier by rail of a trackage right over the property of another such carrier is vested in the Interstate Commerce Commission.

Every interpretation, title, right, privilege and immunity thus set up or claimed by Petitioners under the Constitution and laws of the United States or authority exercised thereunder, was overruled, denied and refused by the action of the Court of Civil Appeals on each of said questions.

11. (a) Each of the foregoing questions was raised in the District Court of Nueces County, Texas, by pleas to the jurisdiction (R. 48, 56), which were overruled (R. 69), and by the answer of the defendants (R. 1). The trial court adjudged that the trackage contract of 1904 was terminated and cancelled as of November 1, 1941, and entered judgment awarding damages in the amount of $184,929.85 as the value of the use of Respondent's property from November 1, 1941 to August 27, 1943; adjudged costs jointly and severally against the Trustee and the St. L. B. & M., and denied the injunction sought by Respondent (R. 85). Each of the questions presented above was further raised in the trial court by Motions for New Trial (R. 91, 96), which were overruled (R. 95, 100), and by motion for judgment *non obstante veredicto* (R. 79), which was also overruled (R. 84).

(b) Petitioners perfected an appeal to the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, and each of the questions was raised before that court by Points of Error in the Brief of Petitioners filed in that court (Points 1, 2, 3 and 4; R. 186). Its opinion (R. 189), reported in 181 S. W. 2nd 895, declared that:

(i) "The fact that the Brownsville Railway (St. L. B. & M.) is in the process of reorganization in bankruptcy (Sec. 77) does not deprive the State Court of jurisdiction of the subject matter of this controversy;"

(ii) "As no affirmative action had been taken by the Interstate Commerce Commission which would in any way conflict with the action taken by the court below, said court had jurisdiction of this controversy and was empowered to render judgment;"

(iii) "The 1904 contract was legally terminated and cancelled as of October 31, 1941."

The opinion and judgment of the Court of Civil Appeals mentioned, but wholly disregarded the effect of, the stay orders entered in the Court of Bankruptcy (R. 192). Petitioners again raised each of the points relied upon in a Motion for Rehearing (R. 199), which was overruled by the Court of Civil Appeals (R. 204).

(c) Petitioners then filed in the Supreme Court of Texas an application for writ of error, again raising each of the issues (R. 204-210). The application was refused by said Court (R. 212). Finally, each of the issues was again raised in the Supreme Court of Texas by a Motion for Rehearing (R. 213-217), which was overruled on November 29, 1944 (R. 212).

12. This Court should exercise its discretion to grant a Writ of Certiorari:

(a) Because the court below has decided Federal questions of substance with regard to the exclusive ju-

risdiction of the Court of Bankruptcy in a way probably not in accord with the applicable decisions of this Court;

(b) Because the court below has decided an important question of Federal law with respect to the effect of the stay orders entered in the Court of Bankruptcy which has not been but should be settled by this Court;

(c) Because the court below has decided an important question of Federal law which has not been but should be settled by this Court and has decided such question in a way which is probably in conflict with the applicable decisions of this Court and which is in conflict with the decision of the court of last resort of another State, *Taylor* v. *Santa Fe, etc.*, 38 N. M. 457, with respect to the question whether a trackage contract between interstate carriers by railroad may be lawfully terminated without the Interstate Commerce Commission having first issued a certificate of public convenience and necessity, permitting abandonment of the operations authorized by and conducted under said contract; and

(d) Because the court below has decided a Federal question of substance with respect to the exclusive jurisdiction of the Interstate Commerce Commission to determine a fair rental or compensation for the use by an interstate carrier by railroad of a trackage right over the property of another such carrier in a way probably not in accord with the applicable decisions of this Court.

13. Petitioners file herewith a certified transcript of the record, as required by Rule 38(1) and attach hereto a brief in support of this Petition.

WHEREFORE, Petitioners, jointly and severally, pray that in the exercise of its discretion, this Court issue its Writ of Certiorari to review the decision herein of the Court of

Civil Appeals for the Fourth Supreme Judicial District of Texas, and for such other orders as may be appropriate.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1000

GUY A. THOMPSON, TRUSTEE; THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY; DEBTOR, AND THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY,

Petitioners.

vs.

THE TEXAS MEXICAN RAILWAY COMPANY

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion Below

The Supreme Court of Texas did not write any opinion. The opinion of the Court of Civil Appeals is not reported officially but may be found in 181 S. W. 2nd 895.

Grounds of Jurisdiction

Jurisdiction of this Court is invoked under Section 237b of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. Sec. 344b, 43 Stat. 937, providing that:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree

has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; * * *; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

As more particularly set out in the foregoing petition for certiorari in paragraphs 10 and 11, the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas involved substantial Federal questions dealing with the construction and application of the Bankruptcy Act, the Interstate Commerce Act, and orders of a court of bankruptcy, all of which were decided adversely to Petitioners by the highest court of the State of Texas in which a decision could be had.

In *Brown* v. *Gerdes*, 321 U. S. 178, certiorari was granted to review the decision of a State Court of last resort which involved the construction of the Bankruptcy Act, and in *Illinois Steel Co.* v. *Baltimore & Ohio Railroad Co.*, 320 U. S. 508, certiorari was granted to review the decision of a State Court of last resort which involved the construction of the Interstate Commerce Act.

The Court of Civil Appeals was, in this case, the State Court of last resort. *Bacon* v. *Texas*, 163 U. S. 207.

Statement of the Case

On November 1, 1904, Petitioner, The St. Louis, Brownsville and Mexico Railway Company, and Respondent, Texas Mexican Railway Company, entered into a contract whereby Respondent granted to The St. Louis, Brownsville and Mexico Railway Company, upon specified rentals, "the right to operate its trains over the main line, * * * as

well as the right to use jointly with the party of the First Part (Texas Mexican Railway Company) * * * real estate and all other property appurtenances as they now exist * * *, which shall be incident and necessary to the use of the said party of the Second Part for the purpose of running its passenger and freight trains over the said line of the party of the First Part between the points hereinbefore mentioned (Robstown and Corpus Christi), * * *, and said right of usage to include also the use of the terminals of the party of the First Part in Corpus Christi; and the said party of the First Part further grants to the said party of the Second Part the right to carry over its said tracks such freight, mail, express and passengers as it may desire, and to receive for its own use and compensation all revenue arising from such services, *and the further right to generally extend and transact its business as a common carrier over the said line* * * * (Emphasis ours).

"This contract * * * shall continue for the full term of fifty (50) years from date, unless sooner terminated by the parties hereto * * *.

"It is further agreed that this contract may be terminated without giving any reason therefor, by either party, upon giving 12 months notice of such intent to terminate the lease" (R. 145).

In certain respects, not here material, the contract was amended in 1914 (R. 146).

On May 2, 1933, The St. Louis, Brownsville and Mexico Railway Company filed its petition, under Section 77 of the Bankruptcy Act, in the District Court of the United States, Eastern Division, Eastern District of Missouri, in a proceeding theretofore filed in said court entitled "In the Matter of Missouri Pacific Railroad Company, Debtor," No. 6935, in Bankruptcy. On the same date said United States

District Court entered an order approving said petition as properly filed (R. 108), and your petitioner, Guy A. Thompson, Trustee, has been at all times material to this suit and is now the duly appointed, qualified and acting Trustee of The St. Louis, Brownsville and Mexico Railway Company, Debtor, in said proceeding, under Section 77 of the Bankruptcy Act (R. 14, 15).

On May 13, 1933, the court of bankruptcy issued its order No. 18, prohibiting any interference with the debtor or its properties (R. 120) (see page 25, *infra*), and on December 2, 1935, by Order No. 116a stayed all suits against the Debtor except "claims for damages caused by the operation of trains, buses or other means of transportation" (R. 123) (see page 25, *infra*).

On October 28, 1940, Respondent notified Petitioners that it was exercising its right to terminate and cancel said contract effective twelve months after November 1, 1940 (R. 42). The Trustee continued his operations in compliance with the requirements of Section 1 (18) of the Interstate Commerce Act, and on May 25, 1942 (R. 1), Respondent sued Petitioners in the District Court of Nueces County, Texas. In its amended petition, upon which trial was had, Tex-Mex prayed that it recover judgment:

> "(a) Enjoining each Defendant, jointly and severally, together with the agents, servants and employees of each several defendants from going upon or from sending motive power and employees of either defendant upon any track, side track or terminal of Plaintiff in the City of Corpus Christi or from Corpus Christi to Robstown in the absence of affirmative consent from Plaintiff.
>
> "(b) That it recover its judgment, jointly and severally, against the Defendants for damages in the sum of $500.00 per day for each and every day said property of Plaintiff has been used by Defendants or either of them since November 1, 1941.

"(c) In event it be held that Plaintiff is not entitled to recover said $500.00 per day, Plaintiff then prays, in the alternative, that it recover, jointly and severally, against said Defendants the reasonable value of the use of said property to Defendants from November 1, 1941, until said property be vacated by the Defendants and unmolested possession and use be surrendered and returned to Plaintiff.

"(d) Plaintiff further prays that it recover in any event exemplary damages against the Defendants, jointly and severally, at the rate of $50.00 a day for each and every day they or either thereof have made use of Plaintiff's property as aforesaid from and after November 1, 1941" (R. 46, 47).

It is undisputed that at all times material hereto both Petitioners and Respondent were interstate carriers by railroad, subject to the provisions of the Interstate Commerce Act, 49 U. S. C., Sec. 1, et seq., 24 Stat. 397, as amended by the Act of February 28, 1920, 41 Stat. 474, and that no certificate of public convenience and necessity had been applied for or issued by the Interstate Commerce Commission permitting abandonment of the Trustee's operations over Respondent's line of railway.

The District Court overruled pleas to its jurisdiction (R. 69), tried the case on the merits (R. 303-1128,[3] and entered judgment that the contract of 1904 had been cancelled and terminated, notwithstanding the absence of a certificate of public convenience and necessity by the Interstate Commerce Commission permitting the Trustee to abandon his operations under the contract, awarded Respondent damages of $184,929.85 against the Trustee, and assessed costs, jointly and severally, against the Petitioners (R. 85-91). Injunctive relief and exemplary damages were denied. Petitioners perfected an appeal to the Court

[3] Reference is to pages 303-1128 of original record which were omitted from printed record by stipulation.

of Civil Appeals for the Fourth Supreme Judicial District of Texas, which, in all things, affirmed the judgment of the District Court (R. 199), and application to the Supreme Court of Texas for Writ of Error was refused (R. 212).

Specification of Errors

I

The Court of Civil Appeals erred in affirming the trial court's judgment overruling Petitioners' pleas to the jurisdiction.

II

The Court of Civil Appeals erred in affirming the judgment of the trial court on the merits, in that neither of said courts had jurisdiction over the subject matter of this suit.

III

The Court of Civil Appeals erred in entering any judgment other than dismissal or stay of the suit in view of the stay orders entered in the Court of Bankruptcy.

IV

The Court of Civil Appeals erred in entering judgment affirming the judgment of the trial court that the trackage contract here involved had been lawfully cancelled and terminated without the Interstate Commerce Commission having first issued a certificate of public convenience and necessity permitting abandonment of the Trustee's operations over Respondent's line of railway.

V

The Court of Civil Appeals erred in entering judgment affirming the judgment of the trial court assessing damages

and costs against Petitioners in view of the exclusive jurisdiction of the Interstate Commerce Commission to determine the fair rental or compensation for the use by Petitioners of the railroad properties involved.

ARGUMENT

Point I

Exclusive jurisdiction of the subject matter of this suit is vested in the Court of Bankruptcy.

Section 77 of the Bankruptcy Act provides that after the filing of a petition by a railroad for reorganization:

> "If the petition is so approved the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the Debtor and its property wherever located * * *." 11 U. S. C. Sec. 205a, 47 Stat. 1474, as amended by 49 Stat. 911 and 49 Stat. 1969.

The plain meaning of this language is certainly that if the Bankruptcy Court has exclusive jurisdiction, no other court can have any jurisdiction to hear and determine a suit involving the title to or right of possession of the property which is in *custodia legis*, or control of the operations of the Trustee operating the property subject to the orders of the court.

In addition to the foregoing provisions of Section 77 of the Bankruptcy Act, Section 77c(2) provides that:

> "The Trustee or Trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the Judge and consistently with the provisions of this section, all of the powers of a Trustee appointed pursuant to Section 72 or any other section of this Title, and, to the extent not incon-

sistent with this Section, if authorized by the Judge, the powers of a Receiver in an equity proceeding, and, subject to the control of the Judge and the jurisdiction of the Commission as provided by Chapter I of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the Debtor."

In *Isaacs versus Hobbs Tie & Timber Company*, 282 U. S. 734, the Court, opinion by Mr. Justice Roberts, said:

"Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. Mueller v. Nugent, 184 U. S. 1, 14, 46 L. Ed. 405, 414, 22 S. Ct. 269. The title and right to possession of all property owned and possessed by the Bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. Robertson v. Howard, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 S. Ct. 854; T. E. Wells & Co. v. Sharp, 125 C. C. A. 609, 208 Fed. 393; Galbraith v. Robson-Hilliard Grocery Co., 133 C. C. A. 46, 216 Fed. 842, 32 Am. Bankr. Rep. 752. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. Robertson v. Howard, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 S. Ct. 854, supra; Re Wilka (D. C.) 131 Fed. 1004. When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 20 S. Ct. 1007; Murphy v. John Hofman Co., 211 U. S. 562, 53 L. Ed. 327, 29 S. Ct. 154; Dayton v. Stanard, 241 U. S. 588, 60 L. Ed. 1190, 36 S. Ct. 695. This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring

jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. Murphy v. John Hoffman Co. 211 U. S. 562, 53 L. Ed. 327, 29 S. Ct. 154, supra; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 52 L. Ed. 379, 28 S. Ct. 182; Harkin v. Brundage, 276 U. S. 36, 72 L. Ed. 457, 48 S. Ct. 268."

There can be no doubt that the rights granted to the St. L. B. & M. under the trackage agreement of 1904 were *property* rights of the bankrupt which passed to the Trustee upon the approval of its petition for reorganization under Section 77 of the Act, and that the existence, validity and effect of the rights granted by the contract should be adjudicated in the Court of Bankruptcy alone, for as was said in *Ex Parte Baldwin*, 291 U. S. 610, opinion by Mr. Justice Brandeis:

"* * * where a court of competent jurisdiction has, through its officers, taken property into its possession, the property is thereby withdrawn from the jurisdiction of other courts. * * * The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them. Murphy v. John Hofman Co., 211 U. S. 562, 569, 29 S. Ct. 154, 53 L. Ed. 327. In bankruptcy, this rule applies regardless of whether the property is located in the district in which the bankruptcy proceedings originated * * *."

In *Continental Bank & Trust Company* v. *Chicago R. I. & P. Ry. Co.*, 294 U. S. 648, the Court, in an opinion by Mr. Justice Sutherland, held that a Federal District Court sitting in bankruptcy had properly enjoined a sale under a mortgage and deed of trust of securities pledged as collateral by the debtor railroad. The Court said:

"* * * As has already been shown, the equity in the collateral remaining in the railroad company is property; and over this property, wherever located,

the federal district court is given exclusive jurisdiction of the precise language of Section 77, just quoted. As a necessary consequence of that jurisdiction, the court must have the power to preserve and safeguard the property for the benefit of the trust estate so far as that is compatible with the rights of the pledgees. Jurisdiction over the property wherever located carries with it jurisdiction to enjoin, in a proper case, interferences with the property."

The rights granted under the trackage agreement of 1904 were no less property of the bankrupt than the equity in the collateral remaining in the railroad company in the *Continental Bank & Trust Company case, supra.* Moreover, that case did not involve the operations of the Trustee. The principles there announced must apply with even greater force to this case where the very operation by the Trustee of the property of the debtor are at stake. In this case, the relief sought was in essence a judicial determination that the contract of 1904 had been cancelled and that the property rights granted under that contract were no longer in force. Respondent further sought an injunction against the Trustee's operations, compensatory damages and exemplary damages for the Trustee's use of the property, which use was subject to the control and direction of the Court of Bankruptcy. Moreover, the Trustee could not lawfully cease or abandon such use of the property without the Interstate Commerce Commission having first issued a certificate of public convenience and necessity permitting such abondonment, as will be more particularly shown hereafter. We can conceive of no case which more directly interferes with the exclusive jurisdiction of the Court of Bankruptcy, the operations of the Trustee in Bankruptcy, or the rights of the creditors of the bankrupt than the case pleaded by Respondent in the court below.

State Courts, other than Texas, have readily recognized the rule of exclusive jurisdiction in the bankruptcy court.

In *Palmer* v. *Larchmont Manor Company*, 30 N. E. (2d) 599, 284 N. Y. 288, Palmer, the Trustee in Bankruptcy of the N. Y., N. H. & H. Ry., brought an action in the State Court to compel the determination of a claim to real property. The complaint was dismissed by the trial court on the ground that the New York court had no jurisdiction over the subject matter of the litigation in view of the bankruptcy. The Court of Appeals of New York said:

> "Upon approval of the petition and upon entry of an order thereon, the bankruptcy court had exclusive jurisdiction of the debtor and its property wheresoever situated. National Bankruptcy Act, Sec. 77, Sub. a, 11 U. S. C. A. Sec. 205, Sub. a. The trustees took possession of the real property in suit following their appointment. That possession was similar to that of a trustee in an ordinary bankruptcy proceeding upon adjudication. Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 737, 51 S. Ct. 270, 75 L. Ed. 645; National Bankruptcy Act, Sec. 77, Sub. c, Par. (2), 11 U. S. C. A. Sec. 205, Sub. c(2). The trustees were powerless to confer, by bringing suit, jurisdiction upon our courts. Isaacs v. Hobbs Tie & Timber Co., supra."

In the opinion of the Court of Civil Appeals in the case at bar it is said that:

> "The relief prayed for by the Texas Mexican Railway Company and granted by the court below was an award of compensation for the use of its property (for a specified period of time) by another *having no contract rights authorizing such use*" (Emphasis ours).

The granting of any relief to Respondent in this cause was, in all events, dependent upon the finding that Petitioners had no contract rights authorizing the use of Respondent's property. Thus, the courts below necessarily decided the question of the existence and validity of the rights granted the St. L. B. & M. under the contract of 1904. That question was the precise question that the State courts

had no jurisdiction to determine. In addition to this, the Court of Civil Appeals has entirely ignored the fact that the suit was not merely one for compensatory damages, but, as shown by the quotation from plaintiff's petition (R. 36-47, 47, page 14, *supra*), it was a suit for injunction, which, if granted, would have prevented the Trustee from making any use of the property involved. The Court of Civil Appeals obviously failed to grasp the fact that the jurisdiction of the State court was determined by the subject matter and main purpose of the suit (cancellation of the contract and injunction), and that even if the State court did have jurisdiction to assess damages against Petitioner, the cancellation of the contract or the injunction, if granted, would vitally affect the debtor, the trustee and his operations. Although injunctive relief was denied, the prayer for injunction was never dismissed for lack of jurisdiction, but was *judicially determined* by the courts below in denying such relief. It is too obvious to require argument that if the State courts had jurisdiction to deny the prayer for injunction, they also had jurisdiction to grant it.

The State courts did not have jurisdiction of the main subject matter and purpose of the suit. In *Ex Parte Baldwin*, 291 U. S. 610, opinion by Mr. Justice Brandeis, the Court said:

> "It is true that the investment company seeks, in addition to the adjudication of the forfeiture of the right of way, damages 'in the sum of $150,000' from the two railways and 'from the trustees, in their said capacity as trustees,' for failure to maintain the daily schedule of passenger trains set forth in the contract. This prayer of the complaint is no bar to staying the suit in the state court. The exclusive jurisdiction of the bankruptcy court is determined by the main purpose of the suit, which is to have the forfeiture declared and the alleged cloud upon title removed. The claim for damages is merely an incident."

The fact that the trial court did not allow the injunction or award the exemplary damages sought cannot change the nature of the suit, nor can the fact that Petitioners answered before filing their motions to stay and their pleas to the jurisdiction of the trial court give any comfort to Respondent. As was said in *Isaacs* v. *Hobbs Tie & Timber Co., supra:*

> "* * * The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the power of the court's officers to oust it by surrender of property which has come into its possession. Whitney v. Wenman, 198 U. S. 539, 25 S. Ct. 778, 49 L. Ed. 1157; In Re Schermerhorn (C. C. A.), 145 F. 341. Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

See also *Palmer* v. *Larchmont Manor Co., supra*, page 21, holding that the trustee cannot, even by choice, confer jurisdiction on any other court.

We cannot over-emphasize the point that the rights granted The St. L. B. & M. under the trackage agreement of 1904, which vested in the Trustee in Bankruptcy, constituted property of the debtor in possession of the Trustee and within the exclusive jurisdiction of the court of bankruptcy. The fact that the rights were granted by contract or lease and not by deed is immaterial, for as was said by Mr. Justice Reed in *Warren* v. *Palmer*, 310 U. S. 132:

> "It is immaterial what title the Debtors had, whether a lease or a fee. The physical property covered by the lease was in the custody of the Connecticut Court by virtue of the provision of Section 77a. By virtue of subdivisions 77c(10) and 77c(6), it is clear that leaseholds are in some instances to be operated by the lessee's trustees."

The Courts below assumed jurisdiction over a cause of action which sought to interfere directly with and to adjudicate the title to the property of the debtor, in possession of the Trustee in Bankruptcy; one which would impede the effectuation of a plan of reorganization, and one involving matters of national interest, the determination of which is vested exclusively in the Interstate Commerce Commission. The express provisions of Section 77 of the Bankruptcy Act and the authorities cited make it clear, beyond dispute, that the State courts had no jurisdiction to hear or determine such a case. The interest of the public in the operation of a bankrupt railroad, as well as the interest of creditors in the due administration of the estate and the preservation of their rights, require that on at least some of the matters involved the jurisdiction of the court of bankruptcy be exclusive.

POINT II

The stay orders entered in the Court of Bankruptcy prohibit the prosecution of this suit in the State Court.

The only exception to exclusive jurisdiction of the court of bankruptcy is the proviso of sub-section (j) of Sec. 77 of the Act, 49 Stat. 911, 922, 11 U. S. C. Sec. 205(j), reading as follows:

> "In addition to the provisions of Section 29 of this Title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: *provided*, That suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any court of competent juris-

diction and any order staying the prosecution of any such cause of action or appeal shall be vacated."

The proviso just quoted did not appear in the original Act. 47 Stat. 1467, Sec. (1). Conformably to the statute then in force, on the 13th day of May, 1933, the Bankruptcy Court issued its stay order No. 18 (R. 120, 122), providing, among other things:

> "All persons, firms or corporations whatsoever and wheresoever situated * * *, are hereby restrained and enjoined from interfering with * * * in any manner whatsoever any portion of the * * * railroad's properties and premises belonging to or in the possession of any of the Debtor's, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any manner, to prevent the discharge by the Debtors of their duties in the operation of said property and business under orders of this court."

Clearly, so far as the suit against the Trustee is concerned, it sought to interfere by injunction and cancellation with property in the possession of the Trustee and to interfere with the discharge of the duties of the Trustee in the operation of the property. On the other hand, concerning the suit against the debtor itself, subsequent to the amendment of sub-section (j) by the Act of August 27, 1935, 49 Stat. 922, the Bankruptcy Court, on December 2, 1935, entered its General Order 116(a) (R. 124, 125), reading in part:

> "That the commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings; provided, however, that suits or claims for damages caused by the operations of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any court of competent juris-

diction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated."

Obviously, Order 116(a) was entered by the bankruptcy court to conform to the amendment of the Act. Congress and the courts have long recognized the injustice of forcing litigants having claims for damages to freight, for personal injuries, or property damage, to bring suit against the trustee in bankruptcy or receiver in equity in a forum far removed from the scene of the accident or loss, and the plain purpose of the proviso, added by the Act of August 27, 1935 and recognized in Order 116(a), was to remedy an existing abuse by permitting the prosecution in local courts of the normal type of freight loss and damage claims, personal injury claims and other claims based upon negligence of the trustee's agents in their operation of his trains or buses. It is clear that neither the Act nor the Order was intended to apply to a suit to enjoin the trustee from operating railroad property, or a suit to try the Trustee's title to property claimed by him or to assess damages for the Trustee's use of property under an allegedly invalid or terminated contract.

There is no reason, by interpretation, to broaden the provisions of the proviso of the Act of August 27, 1935, to permit the prosecution of such a suit in the State court. *Moreover, an integral part of Respondent's suit, if not its prime object, was the demand for an injunction staying the trustee's operations, not in any sense of the word a claim for damages.* As we have already pointed out, the matter of jurisdiction is determined by the relief sought and not by the ultimate relief granted. *Ex Parte Baldwin, supra.*

In *Re Chicago and E. I. Ry. Co.*, 121 Fed. (2d) 785, writ of certiorari denied, 314 U. S. 653, the Circuit Court of Appeals for the Seventh Circuit considered the scope of Sec-

tion 77, Subdivision j, and in holding that the proviso permitted prosecution in the state court of a negligence action arising out of a train wreck, said:

"What reason or reasons did Congress have for making this exception? We can hardly call it speculation when we suggest several which at once present themselves.

"*It evidently placed personal injury claims on a different footing from other claims; whose origin was traceable to an agreement, express or implied.* It is not inconsistent with historical analogies to place injuries to the person in a class different from all other kinds of claims. This Act gives to holders of such claims preference, so far as jurisdiction is concerned, over claimants holding contractual claims. It permits the claimants to sue in the state court and in any Federal court, as well as the one which has jurisdiction of the debtor's estate.

"The plaintiff can thus have the benefit of a jury trial, if he so desires. This in itself is sufficient grounds for making a distinction between claims arising out of personal injuries and other kinds, where a jury trial is not thought so essential.

"Giving jurisdiction to local courts of personal injury cases permits the claimant to sue in local jurisdictions, thus avoiding burdensome cost and long delays which in some instances might be said to be a denial of justice.

"Whatever may have been the reasons, it is clear that the Congress intended to and did make special provision for personal injury cases arising out of the operation of trains. And there is no clear and sufficient reason advanced for dividing the list of such personal injury claims into those which arose before the adjudication and those whose claims occurred subsequently."

See also *Jennings* v. *Public Utility Commission*, 14 Atl. (2d) 882, and *Eldridge* v. *White & Black River Valley Ry. Co.*, 109 S. W. (2d) 658.

This case is certainly not one of the type contemplated by Congress in adopting the proviso of Subsection j of Sec. 77 of the Act, but was a claim whose origin was traceable to an express agreement, the contract of 1904, and was a suit to judicially determine property rights of the trustee and for injunction.

Point III

The trackage contract here involved cannot be lawfully cancelled or terminated in the absence of a certificate of public convenience and necessity, issued by the Interstate Commerce Commission, permitting the abandonment of petitioners' operations authorized by and conducted under said trackage contract.

Paragraph (18) of Section 1 of the Interstate Commerce Act (originally enacted by the Act of February 28, 1920, 41 Stat. 477, and amended by the Act of September 18, 1940, 54 Stat. 899), reads in part as follows:

> "* * * and no carrier by railroad, subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment, * * *."

Therefore, since 1920, it has been unlawful for any common carrier by railroad subject to the Interstate Commerce Act to abandon all or any portion of its line of railroad, or the operation thereof, unless and until such a certificate shall first have been obtained from the Interstate Commerce Commission. The penalty provided for violation of Paragraph (18) of said section, *applying not only to corporations but also to their trustees*, agents, officers and directors, is a fine of not more than $5,000.00, or imprison-

ment for not more than three years, or both. 49 U. S. C., Sec. 1(20). 41 Stat. 478.

The Court of Civil Appeals, in its opinion, recognizes that Petitioners could not lawfully abandon operations under the trackage agreement, but holds that, nevertheless, the contract was legally terminated and cancelled as of October 31, 1941, which results in the absurd conclusion that Respondent could, at will, terminate the contract of 1904 in part (as to the consideration to be paid for the exercise of the rights granted) but not in whole, and could treat Petitioners as trespassers forbidden by law to leave the property trespassed upon. This conclusion is not sustained by the authorities.

The necessary effect of Sec. 1(18) of the Interstate Commerce Act was either (a) to nullify completely the provision of the 1904 contract for termination on twelve months notice, or (b) to require, in addition to such notice, the issuance by the Commission of a certificate of public convenience and necessity authorizing abandonment of Petitioners' operations as a condition precedent to the exercise by either party of the right to terminate the contract. This position is sustained by the language of the Supreme Court in *Warren* v. *Palmer*, 310 U. S. 132, *supra*, in which Mr. Justice Reed said:

> "Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers of Congress. Under the commerce clause of the Constitution Congress likewise has exercised its power to provide for the continued operation of interstate railroads such as petitioner. The fact that the operator operates under a lease does not affect the force of the requirement that the operation must continue until a certificate permitting abandonment is issued by the Interstate Commerce Commission. The judicial functions of the bankruptcy court and the administrative

functions of the Commission work co-operatively in reorganizations."

In the first place, it should be made clear that no constitutional question of interference with contract is involved, since the constitutional prohibition against laws impairing the obligation of contracts is a limitation on the power of the States and not on the power of the Federal government. *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467.

If, as pointed out in the *Mottley* case, Congress, in the course of regulating Interstate Commerce, has power to completely destroy a private contract which conflicts with such regulations, it follows that Congress may add, as a condition of terminating an existing contract, a further requirement or condition, namely, securing a certificate of public convenience and necessity, permitting the abandonment of the operations carried on pursuant to the contract prior to exercising the right of termination. Of course, if Respondent could not cancel the contract without the issuance of the necessary certificate by the Interstate Commerce Commission, then the contract is still in force and effect, and the judgment for damages, not based on the consideration provided by the contract, is wrong.

A well considered decision in a parallel case is that of the Supreme Court of New Mexico, in *Taylor* v. *Santa Fe, etc., Co.*, 34 Pac. (2d) 1102, 1104, 38 N. M. 457. The two railroads there involved were both, as here, engaged in interstate commerce. Prior to April 17, 1931, the San Juan "possessed perpetual trackage over the line of appellant. On that day * * * an instrument called a 'reconveyance, release and cancellation', was executed by the San Juan Railroad, purporting to reconvey to appellant * * * all its trackage rights over appellant's line." Subsequently, Taylor, the receiver of the San Juan, sued ap-

pellant to enjoin it from interfering with him in the operation of trains over the line which had been subject to such trackage rights. From a decree for the receiver the owning line appealed. The Court said:

> "The necessary effect of the attempted reconveyance of April 17, 1931, would be an abandonment of operations by the San Juan Railroad without the consent of the Interstate Commerce Commission, prohibited by, and made a penal offense under, Federal statute. It is manifest, under the foregoing principles, that the agreement was ineffective to divest the San Juan Railroad of the trackage rights here contested. Appellant can claim no rights thereunder, and the trial court rightly refused to recognize it as a defense to this suit."

It will be observed that in the *Taylor* case the Court held that the reconveyance of the trackage rights was ineffective for lack of a certificate by the Interstate Commerce Commission, notwithstanding the fact that the parties had undertaken *by mutual agreement* to cancel the trackage rights. The agreement of the San Juan was evidenced by its execution of the so-called reconveyance; that of appellant by its acceptance thereof, plus its subsequent reliance thereon as a defense to the suit. It was held, nevertheless, that a certificate by the Interstate Commerce Commission that public convenience and necessity permitting the abandonment of the operations of the San Juan was so indispensable that the parties, in the absence of such a certificate, could not validly enter into the contract evidenced by the so-called reconveyance. In the present case, for the same reason, it should be held that *one party* to the trackage contract of 1904 may not, *without the consent of the other party*, terminate that contract in the absence of the required certificate.

In the briefs and arguments before the lower courts, Respondent took the position that the necessary certificate of the Interstate Commerce Commission should have been procured by Petitioners, and the Court of Civil Appeals in its opinion said:

> "The present case is distinguishable upon the facts. It appears that the Tex-Mex Railway made application to the Interstate Commerce Commission for permission to terminate the contract of November, 1904, in accordance with the provisions thereof. This application was returned by the Secretary of the Commission, together with his statement that:
>
> 'The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Sec. 1(18) of the Interstate Commerce Act would extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Co.
>
> 'I note that on November 1, 1940, notice in accordance with the terms of the trackage agreements was written to the Brownsville Company of the intent of the Texas Mexican to cancel the contract. No application has been filed by the Brownsville Company. Accordingly the application and copies are returned herewith.'
>
> "Since receipt of this communication neither the Tex-Mex Railway, nor the Brownsville Railway (or its Trustee) have in any way sought to invoke the jurisdiction of the Interstate Commerce Commission with reference to this controversy." (R. 193).

The Court will observe that Respondent's "application" (R. 175-185), was not an application for a certificate and that Respondent admits that none was made (R. 185). We think it is too obvious to require argument that a letter of the Secretary of the Interstate Commerce Commission stating that the Commission has no authority to con-

sider an application *for permission to terminate a contract*, is not a holding of the Commission, or of a court, or, for that matter, of the Secretary, that the Interstate Commerce Commission would not have had jurisdiction of an application by Respondent *for a certificate of public convenience and necessity permitting abandonment* of the trustee's operations over the lines in question. In fact, the Supreme Court has held that such certificate, if in fact in the public interest, could have been secured upon the application of any party having a proper interest in the subject matter. *Atchison, etc., Ry. Co. & Railroad Commission*, 283 U. S. 380. If the respondent could furnish the necessary service to the public and desired to put a stop to the Trustee's operations over its line it certainly had a proper interest in an application for a certificate permitting the abandonment.

The trackage contract of 1904 contained two principal provisions:

> (1) A grant by Tex-Mex to St. L. B. & M. of the right to operate the latter's trains over the former's property; and
>
> (2) An obligation by the St. L. B. & M. to pay Tex-Mex, for the exercise of the rights so granted, according to the formula contained in the contract.

Section 1(18) of the Interstate Commerce Act prohibits the Tex-Mex (and all others) from doing any act which would prevent St. L. B. & M. from exercising the rights so granted. The obligation to pay according to the contract formula is inseparable from the granted right to operate. The decision below is reducible to the single proposition that Tex-Mex, without subtracting a thing from the rights which in 1904 it granted to St. L. B. & M., has succeeded in cancelling out all those (and only those) provisions of

the contract prescribing the amounts payable. That proposition is patently unsound.

It is respectfully submitted that the contract of 1904 is still in force; that, therefore, the compensation fixed by that contract and which Petitioners have at all times stood ready to pay (R. 1, 7), is the only measure of the amounts which may be due Respondent for the use of its property.

Point IV

Exclusive jurisdiction to determine the fair rental or compensation for the use by one interstate carrier of a line of railway owned and used by another interstate carrier is vested exclusively in the Interstate Commerce Commission.

The administration of a bankrupt railroad corporation is centered in two forums. As to matters affecting the rights of creditors and the effectuation of a fair and orderly plan of reorganization, the jurisdiction of the bankruptcy court is complete and exclusive; but in matters affecting the public interest, the public convenience in, and necessity of, adequate rail service, the jurisdiction of the Interstate Commerce Commission is paramount.

The intertwining of the interests of creditors and the public is recognized by the Bankruptcy Act itself and is pointed out in *Palmer* v. *Massachusetts*, 308 U. S. 79, opinion by Mr. Justice Frankfurter, where the court said:

> "The judicial process in bankruptcy proceedings under Sec. 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission. Thus, in Sec. 77, Sub. c, and Sec. 77, Sub. o, the power of the district courts to permit abandonments is spe-

cifically conditioned on authorization of such abandonments by the Commission."

Although the jurisdiction of the Bankruptcy Court over the debtor and its properties is made exclusive by Section 77, Subd. a of the Bankruptcy Act, 11 U. S. C. A., Sec. 205a, the paramount jurisdiction of the Interstate Commerce Commission over matters affecting the public interest is recognized by other sections of the same Act. Subd. c(1) requires the appointment of trustees of the debtor railroad to be ratified by the Interstate Commerce Commission. Subd. c(2) gives the Commission supervision over the compensation paid to trustees and their counsel. Subd. c(3) permits the issuance of trustees' certificates only with the Commission's approval. Subd. c(10) empowers the Commission to set up the accounts for the allocation of earnings among the various portions of the debtor's line. Subd. c(12) gives the Commission supervision over allowances for the expenses of various parties in interest in connection with the reorganization proceedings. Subds. d and e give to the Commission control over any proposed plan of reorganization.

The jurisdiction of the Interstate Commerce Commission over the abandonment of any line of railroad by an interstate carrier is expressly recognized in the Bankruptcy Act. Sec. 77, c, Title 11 U. S. C. A., Sec. 205(c), reads in part as follows:

> "The trustee * * * shall determine what lines * * * should be abandoned * * * during the pendency of the proceedings, in the interest of the debtor's estate and of ultimate reorganization, but without unduly or adversely affecting the public interest, and shall present to the judge petitions * * * for authority to abandon * * * any such property; and upon order of the judge made after a hearing * * * authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when

required by Chap. I of Title 49 as amended February 28, 1920, or as it may be hereafter amended, the trustee * * * shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment * * * in accordance with the order of the judge * * *."

Respondent has contended, notwithstanding its prayer for injunction and exemplary damages, that the main purpose of its suit was to establish a just compensation for the use of its properties. If that in fact be the nature of its case it none the less is one which affects the public interest in the financial structure, responsibility and continued ability to furnish service as to each of the carriers involved and jurisdiction over the determination of what is a fair compensation under a trackage agreement is vested exclusively in the Interstate Commerce Commission.

In *Transit Commission, et al. v. United States*, 289 U. S. 121, the Long Island Railroad was using certain tracks of the Pennsylvania Railroad under a trackage agreement. Both carriers sought and secured from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing the lessee's operations and specifying the rental.

The New York Transit Commission contended that, under the New York railroad law, it was the only body which had jurisdiction to approve a contract covering operations by one railroad over the lines of the other, and contended that Section 1(18) of the Interstate Commerce Act did not apply to railroad operations under trackage rights. This Court held that the jurisdiction of the Interstate Commerce Commission was exclusive, and said:

"So far as concerns the purpose to be attained by this legislation (the Transportation Act of 1920), there is no room for a distinction between unjustifiable expenditures for the construction or operation of new

mileage on the one hand and inadequate rentals or extortionate exactions under trackage agreements on the other. The reasons for the exertion of federal authority, to the exclusion of state regulation, apply with like force to both. The Act, including Paragraph (18) (dealing with certificates of public convenience and necessity for construction of lines or abandonment of operations), and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate.

* * * On the taking effect of the Transportation Act the state commission was stripped of power to prescribe terms for such operation. The authority of the Interstate Commerce Commission is paramount and, in respect of the operation and agreement under consideration, it is necessarily exclusive." (Parenthetical insertion ours.)

The Court of Civil Appeals, in its opinion, attempts to distinguish the Transit Commission case on the theory that (a) Respondent's "application for permission to terminate the contract of 1904" was denied and that no party to the case had sought to invoke the jurisdiction of the Interstate Commerce Commission with reference to this controversy. The Court of Civil Appeals, from such statement, concludes that since no affirmative action had been taken by the Interstate Commerce Commission, which would conflict with the action of the trial court, the trial court had jurisdiction of the controversy. The Court of Civil Appeals does not cite any cases in support of its conclusions in this respect. We suppose the court had in mind that line of cases holding that where Congress had not exercised its powers to regulate certain phases of Interstate Commerce the States may exercise regulatory powers until such time as Congress sees

fit to legislate upon the subject. In this instance, the Congress *has* legislated upon the subject and has given the Interstate Commerce Commission exclusive regulatory powers over trackage agreements, and the fairness of rentals thereunder. The jurisdiction of the Commission, as pointed out in the Transit Commission case, is exclusive. Such legislative action cast upon the party seeking abandonment of operations the affirmative and positive duty to act. Respondent wholly failed so to do. It did not file a proper application. It filed no application for a certificate. It got no ruling from the Interstate Commerce Commission nor a disclaimer of jurisdiction. All that it ever got was a letter from the Secretary (not a member of Interstate Commerce Commission) that it had no jurisdiction over *an application for leave to terminate a contract.* That letter affirmed the Commission's power to issue a certificate authorizing abandonment of operations.

Just as the interests of due administration of a bankrupt estate and the interest of the creditors in the protection of their rights require that exclusive jurisdiction of suits against the trustee be vested in the bankruptcy court, so the interest of the public in the continued financial ability of an interstate carrier to furnish transportation and otherwise to serve the public, requires that the jurisdiction of the Interstate Commerce Commission to determine what is fair compensation for the use of the line of one carrier by another be exclusive. If the determination of such compensation were left to the courts, the amount of the compensation would be determined by different standards in each instance; it might be left to the discretion of a judge in one case, or be fixed by a jury in another, and there would be no uniformity between judges, no uniformity between the findings of various juries, nor any uniformity as to the rules of evidence or the measure of damages to be applied. In *Texas & Pacific Railway Company* v. *Abilene*

Cotton Oil Company, 204 U. S. 426, opinion by Mr. Justice, later Chief Justice, White, the plaintiff sued in the Texas Courts to recover the excessive part of an allegedly unreasonable tariff rate collected by an interstate carrier, although the rate charged had been filed with the Interstate Commerce Commission. The State Court found the rate in fact to be unreasonable and excessive and gave judgment for the excess to the plaintiff. On writ of error, this Court said:

> "For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached any identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the

alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts, and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the Act impossible."

The present case is shown to contain similar difficulties. A jury has fixed the amount claimed by Respondent for use of the properties to August 27, 1943. That use, presumably, is still continuing. Who will fix the damages for subsequent periods? If the decisions of this Court are followed, and the Interstate Commerce Commission is held to be the sole and exclusive authority, such questions disappear. No other rule is workable.

Conclusion

There is something fundamentally wrong in the judgment of a state court which arrogates to itself jurisdiction of an action to adjudicate property rights of an interstate railroad, in reorganization under Section 77 of the Bankruptcy Act, and to enjoin the operations of a trustee in bankruptcy over property in custodia legis.

There is something fundamentally wrong in the judgment of a state court which disregards the settled legislative and judicial policy of the nation entrusting the public interest in interstate carriers by railroad to the Interstate

Commerce Commission and which substitutes a rule of damages fixed by court and jury and varying in each forum and in each case for the judgment of that expert administrative agency as to what is a fair compensation for the use of the tracks of one interstate carrier by another such carrier.

There is something fundamentally wrong in any judgment which treats a Trustee in Bankruptcy as a trespasser upon property which he cannot abandon without being subjected to a fine of $5000 per day, or imprisonment not in excess of three years.

It is such a judgment that we ask the Court to review.

PETITIONERS respectfully pray that this Honorable Court exercise its jurisdiction to grant a writ of certiorari to review the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and for such other orders and relief as may be appropriate.

Respectfully submitted,

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(6785)

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 42

GUY A. THOMPSON, TRUSTEE,
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, *Petitioners*,

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

BRIEF FOR PETITIONERS

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SUBJECT INDEX

	PAGE
OPINION BELOW	1
GROUNDS OF JURISDICTION	2
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS	5
ARGUMENT	6
Point I	6
Exclusive jurisdiction of the subject matter of this suit is vested in the Court of Bankruptcy.	
Point II	16
The stay orders entered in the Court of Bankruptcy prohibit the prosecution of this suit in the State court.	
Point III	20
The trackage contract here involved cannot be lawfully or effectually terminated in the absence of a certificate of public convenience and necessity, issued by the Interstate Commerce Commission, permitting the abandonment of Petitioners' operations authorized by and conducted under said contract.	
Point IV	30
Jurisdiction to determine the fair rental or compensation for the use by one Interstate Carrier of a line of railway owned and used by another Interstate Carrier is vested exclusively in the Interstate Commerce Commission.	
CONCLUSION AND PRAYER	38

LIST OF AUTHORITIES

CASES CITED

	PAGE
American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 10 Fed. Supp. 512	14
Atchison, etc., Ry. Co. v. Railroad Commission, 283 U.S. 380	25, 27
Continental Bank & Trust Co. v. Chicago R. I. & P. Ry. Co., 294 U.S. 648	9
Eldridge v. White & Black River Valley Ry. Co., 109 S.W. (2d) 658	20
Ex Parte Bladwin, 291 U.S. 610	8, 12
Hill v. Florida, — U.S. —, 89 L. Ed. 1258	32
In re Chicago and E. I. Ry. Co., 121 Fed. (2d) 785; cert. den., 314 U.S. 653	19
Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734	7, 12
Jennings v. Public Utility Commission, 14 Atl. (2d) 882	20
Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467	22
Palmer v. Larchmont Manor Co., 30 N.E. (2d) 599, 284 N.Y. 288	10, 13
Palmer v. Massachusetts, 308 U.S. 79	30
Powell v. United States, 300 U.S. 276	27
Southern Pacific v. Arizona, — U.S. —, 89 L. Ed. 1469	37
Taylor v. Santa Fe, etc., Co., 34 Pac. (2d) 1102, 1104, 38 N.M. 457	22
Texas & P. v. Abilene Cotton Oil Co., 204 U.S. 426	35
Texas & P. v. Gulf C. & S. F., 270 U.S. 266	26
Transit Commission, et al., v. United States, 289 U.S. 121	32, 33, 34
Warren v. Palmer, 310 U.S. 132	13, 21

STATUTES CITED

11 U.S.C., Sec. 205 (a) (Bankruptcy Act, Sec. 77 (a))	6, 18
11 U.S.C., Sec. 205 (c) (2) (Bankruptcy Act, Sec. 77 (c) (2))	7, 18

	PAGE
11 U.S.C., Sec. 205 (j) (Bankruptcy Act, Sec. 77 (j))	16, 17, 18, 19, 20
11 U.S.C., Sec. 205 (o) (Bankruptcy Act, Sec. 77 (o))	31
28 U.S.C., Sec. 344 (b) (Judicial Code, Sec. 237 (b))	1
49 U.S.C., Sec. 1 (18) (Interstate Commerce Act, Sec. 1 (18))	3, 20
49 U.S.C., Sec. 1 (20) (Interstate Commerce Act, Sec. 1 (20))	21

SUPREME COURT OF THE UNITED STATES

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No. 42

GUY A. THOMPSON, TRUSTEE,
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, *Petitioners*,

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

BRIEF FOR PETITIONERS

Opinion Below

The Supreme Court of Texas did not file or render any opinion. The opinion of the Court of Civil Appeals (R. 189, 198) is not officially reported but may be found in 181 S.W. (2d) 895.

Grounds of Jurisdiction

Jurisdiction of this Court is invoked under Section 237b of the JUDICIAL CODE, as amended by the Act of February 13, 1925, 28 U.S.C., Sec. 344b, 43 Stat. 937.

Jurisdiction was discussed at some length in the brief filed in support of the Petition for Certiorari (pp. 11 and 12).

Since the writ has been granted that discussion will not be repeated here.

Statement of the Case

On November 1, 1904, Petitioner, The St. Louis, Brownsville and Mexico Railway Company, and Respondent, Texas Mexican Railway Company, entered into a written contract, whereby Respondent granted to The St. Louis, Brownsville and Mexico Railway Company, upon specified rentals, "the right to operate its trains over the main line, * * * as well as the right to use jointly with the party of the First Part (Respondent) * * * real estate and all other property appurtenances as they now exist * * *, which shall be incident and necessary to the use of the said party of the Second Part (Petitioner Railway Company) for the purpose of running its passenger and freight trains over the said line of the party of the First Part between the points hereinbefore mentioned (Robstown and Corpus Christi), * * *, and said right of usage to include also the use of the terminals of the party of the First Part in Corpus Christi; and the said party of the First Part further grants to the said party of the Second Part the right to carry over its said tracks such freight, mail, express and passengers as it may desire, and to receive for its own use and compensation all revenue arising from such services, *and the further right to generally extend and transact its business as a common carrier over the said line* * * * (Emphasis ours.)

"This contract * * * shall continue for the full term of fifty (50) years from date, unless sooner terminated by the parties hereto * * *.

"It is further agreed that this contract may be terminated without giving any reason therefor, by either party, upon giving 12 months' notice of such intent to terminate the lease" (R. 145).

In certain respects, not here material, the contract was amended in 1914 (R. 146).

On May 2, 1933, Petitioner Railway Company filed its petition, under Section 77 of the Bankruptcy Act, in the District Court of the United States, Eastern Division, Eastern District of Missouri, in a proceeding theretofore filed in said court entitled "In the Matter of Missouri Pacific Railroad Company, Debtor," No. 6935, in Bankruptcy. On the same date said District Court entered an order approving said petition as properly filed (R. 108), and Petitioner Trustee has been at all times material to this suit and is now, the duly appointed, qualified and acting Trustee of The St. Louis, Brownsville and Mexico Railway Company, Debtor, in said proceeding, under Section 77 of the Bankruptcy Act (R. 14, 15).

On May 13, 1933, the Court of Bankruptcy issued its order No. 18 (R. 120), prohibiting any interference with the debtor or its properties (see page 17, *infra*), and on December 2, 1935, by Order No. 116a (R. 123) stayed all suits against the Debtor except "claims for damages caused by the operation of trains, buses or other means of transportation" (see page 17, *infra*).

On October 28, 1940, Respondent notified Petitioners that it was exercising its right to terminate and cancel said contract effective twelve months after November 1, 1940 (R. 42). The Trustee continued his operations after that date in compliance with the requirements of Section 1(18) of the INTERSTATE COMMERCE ACT; and on May 25, 1942 (R. 1), Respondent sued Petitioners in the District Court of Nueces County, Texas. In its amended petition, upon which the trial was had, Respondent prayed that it recover judgment:

"(a) Enjoining each Defendant, jointly and severally, together with the agents, servants and employees of

each several Defendant from going upon or from sending motive power and employees of either Defendant upon any track, side track or terminal of Plaintiff in the City of Corpus Christi or from Corpus Christi to Robstown in the absence of affirmative consent from Plaintiff.

"(b) That it recover its judgment, jointly and severally, against the Defendants for damages in the sum of $500.00 per day for each and every day said property of Plaintiff has been used by Defendants or either of them since November 1, 1941.

"(c) In event it be held that Plaintiff is not entitled to recover said $500.00 per day, Plaintiff then prays, in the alternative, that it recover, jointly and severally, against said Defendants the reasonable value of the use of said property to Defendants from November 1, 1941, until said property be vacated by the Defendants and unmolested possession and use be surrendered and returned to Plaintiff.

"(d) Plaintiff further prays that it recover in any event exemplary damages against the Defendants, jointly and severally, at the rate of $50.00 a day for each and every day they or either thereof have made use of Plaintiff's property as aforesaid from and after November 1, 1941" (R. 46, 47).

It is undisputed that at all times material hereto both Petitioners and Respondent were interstate carriers by railroad, subject to the provisions of the Interstate Commerce Act, 49 U.S.C., Sec. 1, et seq., 24 Stat. 397, as amended by the Act of February 28, 1920, 41 Stat. 474, and that no certificate of public convenience and necessity had been applied for or issued by the Interstate Commerce Commission permitting abandonment of Petitioners' operations over Respondent's line of railway.

The trial court overruled pleas to its jurisdiction and to

stay or dismiss (R. 69); tried the case on the merits (R. 303-1128*), and entered judgment (a) that the contract of 1904 had been cancelled and terminated, notwithstanding the absence of a certificate of public convenience and necessity by the Interstate Commerce Commission permitting the Trustee to abandon his operations under the contract, (b) awarding Respondent damages of $184,929.85 against the Trustee, (c) assessing costs, jointly and severally, against Petitioners, and (d) denying injunctive relief and exemplary damages (R. 85-91). Petitioners perfected an appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, which, in all things, affirmed the judgment of the trial court (R. 199), and Petitioners' application to the Supreme Court of Texas for Writ of Error was refused (R. 212).

Specification of Errors

I.

The Court of Civil Appeals erred in affirming the trial court's judgment overruling Petitioners' pleas to the jurisdiction.

II.

The Court of Civil Appeals erred in affirming the judgment of the trial court on the merits, in that neither of said courts had jurisdiction over the subject matter of this suit.

III.

The Court of Civil Appeals erred in entering any judgment other than dismissal or stay of the suit in view of the stay orders entered in the Court of Bankruptcy.

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* Reference is to a portion of the original record omitted from the printed record by stipulation.

IV.

The Court of Civil Appeals erred in entering judgment affirming the judgment of the trial court that the trackage contract here involved had been lawfully cancelled and terminated without the Interstate Commerce Commission having first issued a certificate of public convenience and necessity permitting abandonment of the Trustee's operations over Respondent's line of railway.

V.

The Court of Civil Appeals erred in entering judgment affirming the judgment of the trial court assessing damages and costs against Petitioners in view of the exclusive jurisdiction of the Interstate Commerce Commission to determine the fair rental or compensation for the use by Petitioners of the railroad properties involved.

ARGUMENT

Point I

Exclusive jurisdiction of the subject matter of this suit is vested in the Court of Bankruptcy.

Section 77 of the BANKRUPTCY ACT provides that after the filing of a petition by a railroad for reorganization:

> "If the petition is so approved the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the Debtor and its property wherever located * * *." 11 U.S.C., Sec. 205a, as amended, 47 Stat. 1474, 49 Stat. 911, 49 Stat. 1969, and 53 Stat. 1406.

The plain meaning of this language is certainly that if the

Bankruptcy Court has exclusive jurisdiction, no other court can have any jurisdiction to hear and determine a suit involving the title to or the right or conditions of possession of the property which is *in custodia legis*, or the control of the operations of the Trustee holding the property subject to the orders of the court.

In addition to the foregoing provisions of Section 77 of the BANKRUPTCY ACT, Section 77c(2) provides that:

> "The Trustee or Trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the Judge and consistently with the provisions of this section, all of the powers of a Trustee appointed pursuant to Section 72 or any other section of this Title, and, to the extent not inconsistent with this Section, if authorized by the Judge, the powers of a Receiver in an equity proceeding, and, subject to the control of the Judge and the jurisdiction of the Commission as provided by Chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the Debtor."

In ISAACS v. HOBBS TIE & TIMBER COMPANY, 282 U.S. 734, the court, opinion by MR. JUSTICE ROBERTS, said:

> "Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. Mueller v. Nugent, 184 U.S. 1, 14, 46 L. Ed. 405, 411, 22 S. Ct. 269. The title and right to possession of all property owned and possessed by the Bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. Robertson v. Howard, 229 U.S. 254, 260, 57 L. Ed. 1174, 1177, 33 S. Ct. 854; T. E. Wells & Co. v. Sharp, 125 C.C.A. 609, 208 Fed. 393; Galbraith v. Robson-Hilliard Grocery Co.,

133 C.C.A. 46, 216 Fed. 842, 32 Am. Bankr. Rep. 752. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. Robertson v. Howard, 229 U.S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 S. Ct. 854, supra; Re Wilka (D.C.), 131 Fed. 1004. When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. White v. Schloerb, 178 U.S. 542, 44 L. Ed. 1183, 20 S. Ct. 1007; Murphy v. John Hofman Co., 211 U.S. 562, 53 L. Ed. 327, 29 S. Ct. 154; Dayton v. Stanard, 241 U.S. 588, 60 L. Ed. 1190, 36 S. Ct. 695. This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction, is competent to hear and determine all questions respecting title, possession and control of the property. Murphy v. John Hofman Co., 211 U.S. 562, 53 L. Ed. 327, 29 S. Ct. 154, supra; Wabash R. Co. v. Adelbert College, 208 U.S. 38, 52 L. Ed. 379, 28 S. Ct. 182; Harkin v. Brundage, 276 U.S. 36, 72 L. Ed. 457, 48 S. Ct. 268."

There can be no doubt that the rights granted to Petitioner Railway Company under the trackage agreement of 1904 (R. 137-145) were *property* rights of the bankrupt which passed to the Trustee upon the approval of the Debtor's petition for reorganization under Section 77 of the Act, and that the existence, extent, validity and effect of the rights granted by the contract should be adjudicated in the Court of Bankruptcy alone, for as was said in EX PARTE BALDWIN, 291 U.S. 610, opinion by MR. JUSTICE BRANDEIS:

"* * * where a court of competent jurisdiction has,

through its officers, taken property into its possession, the property is thereby withdrawn from the jurisdiction of other courts. * * * The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them. Murphy v. John Hofman Co., 211 U.S. 562, 569, 29 S. Ct. 154, 53 L. Ed. 327. In bankruptcy, this rule applies regardless of whether the property is located in the district in which the bankruptcy proceedings originated * * * *."

In CONTINENTAL BANK & TRUST COMPANY v. CHICAGO R. I. & P. RY. CO., 294 U.S. 648, the Court, opinion by MR. JUSTICE SUTHERLAND, held that a court of bankruptcy had properly enjoined a sale, under a mortgage and deed of trust, of securities pledged as collateral by the debtor railroad. The Court said:

"* * * As has already been shown, the equity in the collateral remaining in the railroad company is property; and over this property, wherever located, the federal district court is given exclusive jurisdiction of the precise language of Section 77, just quoted. As a necessary consequence of that jurisdiction, the court must have the power to preserve and safeguard the property for the benefit of the trust estate so far as that is compatible with the rights of the pledgees. Jurisdiction over the property wherever located carries with it jurisdiction to enjoin, in a proper case, interferences with the property * * * *."

The rights granted under the trackage agreement of 1904 were no less property of the bankrupt than the equity in the collateral remaining in the railroad company in the CONTINENTAL BANK & TRUST COMPANY case, supra. Moreover, that case did not involve *operations* of the Trustee. The principles there announced must apply with even greater

force to this case where there is at stake the very operation by the Trustee of the property of the Debtor. In this case, the relief sought (R. 36-47) was in essence a judicial determination that the contract of 1904 had been cancelled and that the property rights granted under that contract were no longer in force. Respondent further sought (R. 46) an injunction against the Trustee's operations, compensatory damages and exemplary damages (R. 47) for the Trustee's use of the property, which use was subject to the control and direction of the court of bankruptcy. Moreover, the Trustee could not lawfully cease or abandon such use of the property without the Interstate Commerce Commission having first issued a certificate of public convenience and necessity permitting such abandonment, as will be more particularly shown hereafter (infra, pp 20 to 24). We can conceive of no case in which there was sought a more direct interference with the exclusive jurisdiction of the Court of Bankruptcy, the operations of the Trustee in Bankruptcy or the rights of the creditors of the Bankrupt, than the case pleaded by Respondent in the trial court.

State Courts, other than those of Texas, have readily recognized the rule of exclusive jurisdiction in the bankruptcy court. In PALMER v. LARCHMONT MANOR COMPANY, 30 N.E. (2d) 599, 284 N.Y. 288, Palmer, the Trustee in Bankruptcy of the New Haven Railroad, brought an action in the State Court to compel the determination of a claim to real property. The complaint was dismissed by the trial court on the ground that the New York court had no jurisdiction over the subject matter of the litigation in view of the bankruptcy. The Court of Appeals of New York said:

> "Upon approval of the petition and upon entry of an order thereon, the bankruptcy court had exclusive jurisdiction of the debtor and its property wheresoever sit-

uated. National Bankruptcy Act, Sec. 77, Sub. a, 11 U.S.C.A., Sec. 205, Sub. a. The trustees took possession of the real property in suit following their appointment. That possession was similar to that of a trustee in an ordinary bankruptcy proceeding upon adjudication. Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734, 737, 51 S. Ct. 270, 75 L. Ed. 645; National Bankruptcy Act, Sec. 77, Sub. c. Par. (2), 11 U.S.C.A., Sec. 205, Sub. c(2). The trustees were powerless to confer, by bringing suit, jurisdiction upon our courts. Isaacs v. Hobbs Tie & Timber Co., supra."

In the opinion of the Court of Civil Appeals in the case at bar it was said:

> "The relief prayed for by the Tex-Mex Railway and granted by the court below was an award of compensation for the use of its property (for a specified period of time) by another *having no contract rights* authorizing such use." (Emphasis ours.)

The granting of any relief to Respondent in this cause was, in all events, dependent upon the finding that Petitioners had no contract rights authorizing the use of Respondent's property. Thus, the courts below necessarily decided the question of the existence, extent and validity of the rights granted Petitioner Railway Company under the contract of 1904. That was the precise question that the State courts had no jurisdiction to determine. In addition to this, the Court of Civil Appeals entirely ignored the fact that the present suit was not merely one for compensatory damages, but (R. 36-47) it was also a suit for injunction, which, if granted, would have prevented the Trustee from making any use of the property involved. The Court of Civil Appeals obviously failed to grasp the fact that the jurisdiction of the State court was determined by the subject matter

and main purpose of the suit (cancellation of the contract and injunction), and that even if the State court did have jurisdiction to assess damages against Petitioner, the cancellation of the contract or the injunction, if granted, would vitally affect the debtor, the trustee and his operations. Although injunctive relief was denied, the prayer for an adjudication that the contract was ended was granted (R. 90) and that for injunction was never dismissed for lack of jurisdiction, but was judicially determined by denying such relief (R. 91). It is plain that if the State courts had jurisdiction to deny the prayer for injunction, they also had jurisdiction to grant it.

The State courts did not have jurisdiction of the main subject matter and purpose of the suit. In EX PARTE BALDWIN, 291 U.S. 610, opinion by MR. JUSTICE BRANDEIS, the Court said:

> "It is true that the Investment Company seeks, in addition to the adjudication of the forfeiture of the right of way, damages 'in the sum of $150,000' from the two railways and 'from the trustees in their said capacity as trustees' for failure to maintain the daily schedule of passenger trains set forth in the contract. This prayer of the complaint is no bar to staying the suit in the state court. The exclusive jurisdiction of the bankruptcy court is determined by the main purpose of the suit, which is to have the forfeiture declared and the alleged cloud upon title removed. The claim for damages is merely an incident."

The fact that the trial court did not allow the injunction or award the exemplary damages sought cannot change the nature of the suit, nor can the fact that Petitioners answered before filing their motions to stay and their pleas to the jurisdiction of the trial court give any comfort to Respondent. As was said in ISAACS v. HOBBS TIE & TIMBER CO., supra:

> " * * * The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the power of the court's officers to oust it by surrender of property which has come into its possession. Whitney v. Wenman, 198 U.S. 539, 25 S. Ct. 778, 49 L. Ed. 1157; In re Schermerhorn (C.C.A.), 145 F. 341. Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

See also PALMER v. LARCHMONT MANOR CO., supra, page 10, holding that the trustee cannot, even by choice, confer jurisdiction on any other court.

We revert to the proposition that the rights granted Petitioner Railway Company under the trackage agreement of 1904, and subsequently vested in the Trustee, constituted property of the debtor in the possession of the Trustee and within the exclusive jurisdiction of the court of bankruptcy. The fact that the rights were granted by contract or lease and not by deed is immaterial, for as was said by MR. JUSTICE REED in WARREN v. PALMER, 310 U.S. 132:

> "It is immaterial what title the debtors had, whether a lease or a fee. The physical property covered by the lease was in the custody of the Connecticut court by virtue of the provision of Section 77a. By virtue of Subdivisions 77c(10) and 77c(6), it is clear that leaseholds are in some instances to be operated by the lessee's trustees."

The courts below assumed jurisdiction over a claim by which it was sought to interfere directly with and to adjudicate the title to the property of the debtor, in possession of the Trustee in Bankruptcy; one which would impede the effectuation of a plan of reorganization, and one in-

volving matters of national interest, the determination of which is vested exclusively in the Interstate Commerce Commission. The express provisions of Section 77 of the BANKRUPTCY ACT and the authorities cited make it clear that the State courts had no jurisdiction to hear or determine such a case. The interest of the public in the operation of a bankrupt railroad, as well as the interest of creditors in the due administration of the estate and the preservation of their rights, require that on at least some of the matters involved the jurisdiction of the court of bankruptcy be exclusive.

The Respondent has urged that as to the Trustee, Section 66 of the JUDICIAL CODE,[1] 28 U.S.C., Sec. 125, authorizes suit in the State court, and that General Order No. 18 entered by the court of bankruptcy (infra, page 17), restraining all persons, firms, or corporations from interfering with, in any manner whatsoever, any portion of the railroad's properties and premises belonging to or in possession of any of the debtors, or from taking possession of, or in any way interfering with the same, etc., is in conflict with Section 66 of the JUDICIAL CODE.

Section 66 of the JUDICIAL CODE does not confer on any other court jurisdiction of a suit of this kind, directly affecting the possession, control, or management of the property, either in the hands of the trustee or the debtor. In AMERICAN BRAKE SHOE & FOUNDRY COMPANY v. INTERBOROUGH RAPID TRANSIT COMPANY, 10 Fed. Supp. 512,

[1] Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

applications were made by the City of New York and others for leave to sue the Interborough, its Receiver, and others, in the State Court for a declaratory judgment that cessation of the operation of certain through trains over elevated and subway routes would be a breach of Interborough's obligations to the city; and, further, for an injunction against such threatened breach and specific performance by the Interborough and its Receiver of their alleged contractual obligations, although without enforcement thereof during the receivership. The Court said:

> "Section 66 of the Judicial Code is the chief reliance on behalf of the city in its asserted claim. In urging that Application 52 is an 'act or transaction' within the meaning of this provision, the city, in my opinion, misconceives the scope of the enactment. As uniformly interpreted by the courts, its sole purpose is to make federal receivers amenable to state court suits on causes of action arising out of the ordinary operation of the company in receivership. Actions for personal injuries caused by the negligent operation of a common carrier are a familiar example. Gableman v. Peoria, Decatur & Evansville R. R. Co., 179 U.S. 335, 21 S. Ct. 171, 45 L. Ed. 220 (1900). On the other hand, causes directly affecting the administration of the receivership res, or property rights therein, do not fall within the provision; to allow such suits to be instituted without leave of the court which has the property in its custody would divest it of its exclusive jurisdiction thereover and lead but to conflict and confusion in administration. Such was not the legislative purpose.
>
> "* * * Section 66 does not embrace suits intended to establish liens or possessory or ownership rights in the receivership res. Field v. Kansas City Refining Co., 296 F. 800 (C.C.A. 8th, 1924), cert. denied 266 U.S. 618, 45 S. Ct. 98, 69 L. Ed. 471; Id., 9 F. (2d) 213 (C.C.A. 8th, 1925), cert. denied 271 U.S. 676, 46 S. Ct. 489, 70

L. Ed. 1146; Buchannon & N. R. Co. v. Davis, 135 F. 707 (C.C.A. 4th, 1905); J. I. Case Plow Works v. Finks, 81 F. 529 (C.C.A. 5th, 1897). Cf. Wabash Railroad Co. v. Adelbert College, 208 U.S. 38, 54, 28 S. Ct. 182, 52 L. Ed. 379 (1908); Edward Murphy, 2d, v. John Hoffman Co., 211 U.S. 562, 569, 29 S. Ct. 154, 53 L. Ed. 327 (1909)."

The Circuit Court of Appeals on the opinion below affirmed the judgment of the District Court (76 Fed. (2d) 1002), and this Court denied certiorari (295 U.S. 760).

Section 66 of the JUDICIAL CODE can have no application to the case at bar. This is a suit in which it is sought to interfere directly with and to adjudicate the title to the property of the debtor, and to control the trustee by injunction. That is a far cry from suing the trustee for damages in a negligence case.

Point II

The stay orders entered in the Court of Bankruptcy prohibit the prosecution of this suit in the State court.

The only exception to exclusive jurisdiction of the Court of Bankruptcy is the proviso of Subsection (j) of Sec. 77 of the Act, 49 Stat. 911, 922, 11 U.S.C., Sec. 205 (j), reading as follows:

> "In addition to the provisions of Section 29 of this Title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: *Provided*, That suits or claims for damages caused by the operation of trains, buses, or

other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated."

The proviso just quoted did not appear in the original Act. 47 Stat. 1467, Sec. (1). Conformably to the statute then in force, on May 13, 1933, the court of bankruptcy issued its stay order No. 18 (R. 120, 122), providing among other things:

"All persons, firms or corporations whatsoever and wheresoever situated * * * are hereby restrained and enjoined from interfering with * * * in any manner whatsoever any portion of the * * * railroad's properties and premises belonging to or in the possession of any of the Debtors, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any manner to prevent the discharge by the Debtors of their duties in the operation of said property and business under orders of this court."

So far as the present suit is one against the Trustee, it seeks to interfere, by injunction and cancellation, with property in the possession of the Trustee, and to interfere with the discharge of the rights and duties of the Trustee in the operation of the property. On the other hand, so far as the suit is one against the debtor it will be noted that subsequent to the amendment of Subsection (j) by the Act of August 27, 1935, 49 Stat. 922, the court of bankruptcy, on December 2, 1935, entered its General Order 116(a) (R. 124, 125), which is applicable and reads in part:

"That the commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings; provided, however, that suits or claims

for damages caused by the operations of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated."

Obviously, Order 116(a) was entered by the court of bankruptcy to conform to and comply with the amendment of August 27, 1935. Congress and the courts have long recognized the injustice of forcing litigants with claims for damages to freight, for personal injuries, or property damage, to bring their suits against trustees in bankruptcy or receivers in equity in forums far removed from the claimant's residence and the scene of the accident or loss. The plain purpose of the proviso, added on August 27, 1935, and recognized in Order 116(a), was to bring the Bankruptcy Act into undeniable conformity with Section 66 of the JUDICIAL CODE by permitting the prosecution in local courts of the normal type of freight loss and damage claims, personal injury claims and other claims based upon negligence of the trustee's agents in their operation of his trains or buses. It is clear that neither the Act nor the proviso contained in the later Order was intended to apply to a suit to enjoin the trustee from operating a railroad property, or to a suit to try the Trustee's title to property claimed by him and previously in the possession of the debtor or to a suit to assess damages for the Trustee's use of property under an allegedly invalid or terminated contract. Section 77j on its face has no application to the Trustee and does not broaden Sec. 77a or Sec. 77c(2), supra, and in no way enlarges or conflicts with such Order No. 18.

There is no apparent reason, by interpretation, to broaden the provisions of the proviso inserted in this statute on August 27, 1935, to permit the prosecution of such a suit in the State court. *Moreover, an integral part of Respondent's*

suit, if not its prime object, was the demand for an injunction staying the Trustee's operations, not in any sense of the word a claim for damages. As we have already pointed out, the matter of jurisdiction is determined by the relief sought and not by the relief ultimately granted. EX PARTE BALDWIN, supra.

IN RE CHICAGO AND E. I. RY. CO., 121 Fed. (2d) 785, certiorari denied, 314 U.S. 653, the Circuit Court of Appeals for the Seventh Circuit considered the scope of Section 77, Subsection (j). In holding that the proviso permitted prosecution in the State court of a negligence action arising out of a train wreck the court said:

> "What reason or reasons did Congress have for making this exception? We can hardly call it speculation when we suggest several which at once present themselves.
>
> "*It evidently placed personal injury claims on a different footing from other claims, whose origin was traceable to an agreement, express or implied.* It is not inconsistent with historical analogies to place injuries to the person in a class different from all other kinds of claims. This Act gives to holders of such claims preference, so far as jurisdiction is concerned, over claimants holding contractual claims. It permits the claimants to sue in the state court and in any Federal court, as well as the one which has jurisdiction of the debtor's estate.
>
> "The plaintiff can thus have the benefit of a jury trial, if he so desires. This in itself is sufficient grounds for making a distinction between claims arising out of personal injuries and other kinds, where a jury trial is not thought so essential.
>
> "Giving jurisdiction to local courts of personal injury cases permits the claimant to sue in local jurisdictions, thus avoiding burdensome cost and long delays which in some instances might be said to be a denial of justice.
>
> "Whatever may have been the reasons, it is clear that the Congress intended to and did make special provision

> for personal injury cases arising out of the operation of trains. And there is no clear and sufficient reason advanced for dividing the list of such personal injury claims into those which arose before the adjudication and those whose claims occurred subsequently." (Emphasis ours.)

See also JENNINGS v. PUBLIC UTILITY COMMISSION, 14 Atl. (2nd) 882, and ELDRIDGE v. WHITE & BLACK RIVER VALLEY RY. CO., 109 S.W. (2d) 658.

This case is certainly not one of the type contemplated by Congress in adopting the proviso of sub-section (j) of Sec. 77 of the Act, but is based on a claim whose origin is directly traceable to an express agreement, the contract of 1904, and is a suit to secure a judicial determination of property rights of the trustee and for injunction to stop his operations.

Point III

The trackage contract here involved cannot be lawfully or effectually terminated in the absence of a certificate of public convenience and necessity, issued by the Interstate Commerce Commission, permitting the abandonment of Petitioners' operations authorized by and conducted under said contract.

Paragraph (18) of Section 1 of the Interstate Commerce Act (originally enacted by the Act of February 28, 1920, 41 Stat. 477, and amended by the Act of September 18, 1940, 54 Stat. 899), reads in part as follows:

> " * * * and no carrier by railroad, subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment, * * * "

Therefore, since 1920, it has been unlawful for any common carrier by railroad, subject to the Interstate Commerce Act, including the Petitioners, to abandon all or any portion of its line of railroad, or the operation thereof, unless and until such a certificate shall first have been obtained from the Interstate Commerce Commission. The penalty provided for violation of Paragraph (18) of said section, *applying not only to corporations but also to their trustees*, agents, officers and directors, is a fine of not more than $5,000.00, or imprisonment for not more than three years, or both. 49 U. S. C., Sec. 1 (20). 41 Stat. 478.

The Court of Civil Appeals, in its opinion, recognized (R. 194) that Petitioners could not lawfully abandon operations under the trackage agreement, but holds that, nevertheless, the contract "was legally terminated and cancelled as of October 31, 1941." This results in the absurd conclusion that Respondent could, at will, terminate the contract of 1904 *in part* (as to the consideration to be paid for the exercise of the rights granted) *but not in whole*, and could treat Petitioners as trespassers forbidden by law to leave the property trespassed upon. This conclusion is not sustained by the authorities.

The necessary effect of Sec. 1 (18) of the INTERSTATE COMMERCE ACT was either (a) to nullify completely the provision of the 1904 contract for termination on twelve months notice, or (b) to require, in addition to such notice, the issuance by the Commission of a certificate of public convenience and necessity authorizing abandonment of Petitioners' operations as a condition precedent to the exercise by either party of the right to terminate the contract. This position is sustained by the decision in WARREN v. PALMER, 310 U.S. 132, in which MR. JUSTICE REED said:

> "Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers

> of Congress. Under the commerce clause of the Constitution Congress likewise has exercised its power to provide for the continued operation of interstate railroads such as petitioner. The fact that the operator operates under a lease does not affect the force of the requirement that the operation must continue until a certificate permitting abandonment is issued by the Interstate Commerce Commission. The judicial functions of the bankruptcy court and the administrative functions of the Commission work co-operatively in reorganizations."

It is clear that no constitutional question of interference with contract rights is involved, since the constitutional prohibition against laws impairing the obligation of contracts is a limitation on the power of the States and not on the power of the Federal government. LOUISVILLE & NASHVILLE R. Co. v. MOTTLEY, 219 U.S. 467.

If, as pointed out in the MOTTLEY case, Congress, in the course of regulating Interstate Commerce, has power to destroy utterly a private contract which conflicts with such regulations, it follows that Congress may add, as a condition of terminating an existing contract, a further requirement or condition, namely, securing a certificate of public convenience and necessity permitting the abandonment of the operations carried on pursuant to the contract prior to exercising the right of termination. Of course, if Respondent, as we contend, could not cancel the contract without the issuance of the necessary certificate by the Interstate Commerce Commission, then the contract is still in force, and the judgment for damages, not based on the consideration provided by the contract, is wrong.

A well considered decision in a parallel case is that of the Supreme Court of New Mexico, in TAYLOR v. SANTA FE, ETC., Co., 34 Pac. (2d) 1102, 1104, 38 N.M. 457. The two

railroads there involved were both, as here, engaged in interstate commerce. Prior to April 17, 1931, the San Juan "possessed perpetual trackage over the line of appellant (the Santa Fe). On that day * * * an instrument called a 'reconveyance, release and cancellation' was executed by the San Juan Railroad, purporting to reconvey to appellant * * * all its trackage rights over appellant's line." Subsequently, Taylor, the receiver of the San Juan, sued appellant to enjoin it from interfering with him in the operation of trains over the line which had been subject to such trackage rights. From a decree for the receiver the owning line appealed. The Court said:

> "The necessary effect of the attempted reconveyance of April 17, 1931, would be an abandonment of operations by the San Juan Railroad without the consent of the Interstate Commerce Commission, prohibited by, and made a penal offense under, Federal statute. It is manifest, under the foregoing principles, that the agreement was ineffective to divest the San Juan Railroad of the trackage rights here contested. Appellant can claim no rights thereunder, and the trial court rightly refused to recognize it as a defense to this suit."

It will be observed that in the TAYLOR case the Court held that the reconveyance of the trackage rights was ineffective for lack of a certificate by the Interstate Commerce Commission, notwithstanding the fact that the parties had undertaken *by mutual agreement* to cancel the trackage rights. The agreement of the San Juan was evidenced by its execution of the so-called reconveyance; that of appellant by its acceptance thereof, plus its subsequent reliance thereon as a defense to the suit. It was held, nevertheless, that a certificate by the Interstate Commerce Commission that public convenience and necessity permitting the abandonment of the operations of the

San Juan was so indispensable that the parties, in the absence of such a certificate, could not validly enter into the contract evidenced by the so-called reconveyance. In the present case, for the same reason, it should be held that *one party* to the trackage contract of 1904 may not, *without the consent of the other party*, terminate that contract in the absence of the required certificate.

In the briefs and arguments before the State courts, Respondent took the position that the necessary certificate of the Interstate Commerce Commission should have been procured by Petitioners. The Court of Civil Appeals, in its opinion, said:

> "The present case is distinguishable upon the facts. It appears that the Tex-Mex Railway made application to the Interstate Commerce Commission for permission to terminate the contract of November, 1904, in accordance with the provisions thereof. This application was returned by the Secretary of the Commission, together with his statement that:
>
> 'The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Sec. 1(18) of the Interstate Commerce Act would extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Co.
>
> 'I note that on November 1, 1940, notice in accordance with the terms of the trackage agreements was written to the Brownsville Company of the intent of the Texas Mexican to cancel the contract. No application has been filed by the Brownsville Company. Accordingly the application and copies are returned herewith.'
>
> "Since receipt of this communication neither the Tex-Mex Railway, nor the Brownsville Railway (or its Trustee) have in any way sought to invoke the juris-

diction of the Interstate Commerce Commission with reference to this controversy" (R. 193).

The Court will observe that Respondent's "application" (R. 175-185), was not an application for a certificate permitting an abandonment, and that Respondent admits that no such application was made and no such certificate was issued (R. 13). A letter of the Secretary of the Interstate Commerce Commission stating that the Commission has no authority to consider an application *for permission to terminate a contract*, is not a holding by the Commission, or a court, or, for that matter, by the Secretary, that the Interstate Commerce Commission would not have had jurisdiction of an application by Respondent *for a certificate of public convenience and necessity permitting abandonment* of the Trustee's operations over the lines in question. In fact, this court long ago held that such certificate, if in fact in the public interest, could have been secured upon the application of any party having a proper interest in the subject matter. ATCHISON, ETC., RY. CO. v. RAILROAD COMMISSION, 283 U.S. 380. If the respondent could furnish the necessary service to the public and desired to put a stop to the Trustee's operations over its line it certainly had a sufficient interest to enable it to prosecute an application for a certificate permitting the abandonment.

In Respondent's brief filed in opposition to the petition for certiorari, Respondent asserts (p. 26) that it could not have filed an application for such a certificate because "this court seems to have already held between adversely interested carriers that one not conducting or proposing to conduct the operations is not a party having proper interest to make an application with respect to the other's operations or not under Sec. 1(18) of said Act."

The cases cited by Respondent do not sustain t[illegible] conclu-

sion. In TEXAS & P. v. GULF C. & S. F., 270 U.S. 266, the Texas & Pacific Railway Company brought a suit to enjoin the construction of new trackage by the Gulf, Colorado & Santa Fe Railway Company. There was no question of any operation by one of the roads over the line of the other. In defending, the G. C. & S. F. argued that since there was no finding by the Interstate Commerce Commission that the trackage in question constituted an extension, the District Court did not have jurisdiction to enjoin the construction of the line. The language of MR. JUSTICE BRANDEIS, quoted by Respondent:

> "But a party in interest, who is opposed to the construction, is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition,"

must be construed in the light of the circumstances of that case. Sec. 1(20) of the Interstate Commerce Act provides that "any construction, operation or abandonment contrary to the provisions of this paragraph, or of Paragraph (18) or (19) of this Section, may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission * * *, or any party in interest * * *."

With this explicit statutory remedy for redress against unauthorized construction, it cannot well be said that an interested carrier or any other interested party could apply (in advance of proposed construction by some other carrier) for a certificate or finding by the Commission that such proposed or threatened construction or abandonment would be unlawful or contrary to the public interest. In the case at bar no unlawful act has been committed by Petitioners so as to authorize suit in the District Court under the provisions of Sec. 1(20), but Respondent as an interested party

desiring to terminate the Petitioners' right to use the property, and incident to this, the trackage agreement of 1904, could certainly, under the holding in ATCHISON, TOPEKA & SANTA FE RY. CO. v. RAILROAD COMMISSION, supra, apply to the Commission for a certificate of public convenience and necessity permitting the abandonment of Petitioners' operations. Instead, it chose, by a suit for injunction and damages in the State Court, to seek an order requiring Petitioners, in effect, to abandon a lawful operation. If the injunctive relief thus sought in the State Court had been granted, and the injunction obeyed, any interested party, pursuant to Section 1(20) of the Interstate Commerce Act, could have enjoined Petitioners in the Federal District Court from abandoning the operations enjoined by the State Court. Could the absurdity of Respondent's contentions be more plainly exposed?

Respondent also cites POWELL v. UNITED STATES, 300 U.S. 276. In that case the Seaboard made a contract with the lessees of a track extending from Ft. Benning Junction to Ft. Benning for the handling of traffic from Seaboard's station at Ft. Benning Junction into Ft. Benning for a fixed sum per car. The Seaboard then published joint through rates to Ft. Benning. Powell, Receiver of the Central of Georgia, sought to have the rates cancelled. They were cancelled by the Interstate Commerce Commission. Seaboard brought suit to have the order cancelling the rates set aside. This action was properly heard before a three-judge District Court under the URGENT DEFICIENCIES ACT, 28 U.S.C. 47. The Receiver intervened in the proceeding, making allegations appropriate for a complaint in a suit under Section 1(20) of the Interstate Commerce Act to prevent a violation of Sec. 1(18) of the Act, that is, an unlawful extension of its facilities by the Seaboard. This Court held that the three-judge District Court had jurisdiction of Seaboard's

suit, but that the Central's Receiver had mistaken his remedy as only a District Court (one judge) had jurisdiction of suits to enjoin violations under Section 1(20) of the Act.

Certainly the Commission would not have had jurisdiction over a proceeding by the Central to secure a certificate of public convenience and necessity permitting the Seaboard to abandon operations between Ft. Benning Junction and Ft. Benning, for it had a complete remedy, either to intervene if Seaboard made the application to the Interstate Commerce Commission, or to sue in the District Court to enjoin the operations under Section 1(20).

If a municipality and a State Railroad Commission, representing the public, have a sufficient interest, as held in the LOS ANGELES case, to enable them to file and prosecute an application for an abandonment certificate, it would be hard to demonstrate that the owner of the property used in the operation lacks the requisite interest.

The trackage contract of 1904 contained two principal provisions:

> (1) A grant by Respondent to Petitioner Railway Company of the right to operate the latter's trains over the former's property; and
>
> (2) An obligation by the latter to pay the former for the exercise of the rights so granted, according to the formula contained in the contract.

Section 1(18) of the Interstate Commerce Act prohibits Respondent (and all others) from doing any act which would prevent Petitioners from exercising the rights so granted. The obligation to pay according to the contract formula is inseparable from the granted right to operate. The decision below is reducible to the single proposition that Respondent, without subtracting a thing from the rights which

in 1904 it granted to one of the Petitioners has succeeded in cancelling out all those (and only those) provisions of the contract prescribing the amounts payable. That proposition is patently unsound.

It stands conceded that Petitioners may not abandon the use of the property without a certificate from the Interstate Commerce Commission. If they are prohibited by law from abandoning its possession and use they must have a right to possess and use the property. If there is such a right in Petitioners what is its origin? Such right of possession and use does not rest on ownership because Petitioners concede that Respondent is the owner of the property. Only two bases upon which such rights might rest are apparent: The trackage contract of 1904 and the Transportation Act, 1920, as amended. The rights of possession and use must rest either (a) on the contract of 1904 or (b) on the Transportation Act, 1920, or (c) partly on the contract and partly on the statute. If those rights are claimed to depend in any degree upon the Act of 1920 or any of its amendments two further questions immediately arise. First, what are the words of the statute which create or give rise to a trackage right enjoyed by one railroad in the property of another; and second, why is it that the statute, passed in 1920, did not give rise to any such right until the end of October, 1941?

The contract of 1904 conferred no right to effect a partial termination of the agreement by notice or otherwise. The plain language of the contract was that by the requisite notice "this contract may be terminated." It seems to us to be plain that until the Respondent is able in some way to destroy the rights of possession and use granted by it in 1904 it cannot successfully contend that the contract then made has been terminated.

It is respectfully submitted that the contract of 1904 is

still in force; that, therefore, the compensation fixed by that contract and which Petitioners have at all times stood ready to pay (R. 1, 7), is the measure and the only measure of the amounts due Respondent for the use of its property.

Point IV

Jurisdiction to determine the fair rental or compensation for the use by one Interstate Carrier of a line of railway owned and used by another Interstate Carrier is vested exclusively in the Interstate Commerce Commission.

The administration of a bankrupt railroad corporation occurs in two forums. As to matters affecting the rights of creditors and the effectuation of a fair and orderly plan of reorganization, the jurisdiction of the court of bankruptcy is complete and exclusive; but in matters affecting the public interest, the public convenience in, and necessity for, adequate and continuous rail service, the jurisdiction of the Interstate Commerce Commission is paramount.

The intertwining of the interests of creditors and the shipping and travelling public is recognized by the Bankruptcy Act itself and is pointed out in PALMER v. MASSACHUSETTS, 308 U.S. 79, opinion by MR. JUSTICE FRANKFURTER, where the Court said:

> "The judicial process in bankruptcy proceedings under Sec. 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission. Thus, in Sec. 77, Sub. c, and Sec. 77, Sub. o, the power of the district courts to permit abandonments is speci-

fically conditioned on authorization of such abandonments by the Commission."

Although the jurisdiction of the court of bankruptcy over the debtor and its properties is made exclusive by Section 77, Sub. a of the Bankruptcy Act (11 U.S.C., Sec. 205a), the paramount jurisdiction of the Interstate Commerce Commission over matters affecting the public interest is recognized by other sections of the same Act. Sub. c(1) requires the appointment of trustees of the debtor railroad to be ratified by the Interstate Commerce Commission. Sub. c(2) gives the Commission supervision over the compensation paid to trustees and their counsel. Sub. c(3) permits the issuance of trustees' certificates only with the Commission's approval. Sub. c(10) empowers the Commission to set up the accounts for the allocation of earnings among the various portions of the debtor's line. Sub. c(12) gives the Commission supervision over allowances made to various parties in interest in connection with the reorganization proceedings. Subs. d and e give the Commission control over any proposed plan of reorganization.

The jurisdiction of the Commission over the abandonment of any line of railroad by an interstate carrier is expressly recognized in the Bankruptcy Act. Sec. 77, Sub. o, 11 U.S.C., Sec. 205(o), reads in part as follows:

> "The trustee * * * shall determine what lines * * * should be abandoned * * * during the pendency of the proceedings, in the interest of the debtor's estate and of ultimate reorganization, but without unduly or adversely affecting the public interest, and shall present to the judge petitions * * * for authority to abandon * * * any such property; and upon order of the judge made after a hearing * * * authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by Chap.

I of Title 49, as amended, February 28, 1920, or as it may be hereafter amended, the trustee * * * shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment * * * in accordance with the order of the judge * * * ."

It might be argued that where the public interest in the operations of an interstate carrier by rail is concerned, Congress, by the Interstate Commerce Act, has completely occupied the field of regulation c.f., HILL v. FLORIDA, —— U.S.——, 89 L. Ed. 1258. However, it does not seem to us to be necessary to press the argument that far, and it may well be that the Court would not hold that Act to occupy the field as completely as the Labor Acts.

Respondent has contended, notwithstanding its prayer for injunction and exemplary damages, that the main purpose of its suit was to establish and secure just compensation for the use of its properties. If that in fact be the nature of its case it none the less is one which affects the public interest in the financial structure and responsibility and the continued ability to furnish service as to each of the carriers involved. Jurisdiction over the determination of such compensation for use under a trackage agreement is vested exclusively in the Interstate Commerce Commission.

In TRANSIT COMMISSION, ET AL., v. UNITED STATES, 289 U.S. 121, the Long Island Railroad was using certain tracks of the Pennsylvania Railroad under a trackage agreement. Both carriers sought and secured from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing the user's operations and specifying the approved rental.

The New York Transit Commission contended that under the New York railroad law it was the only body which had jurisdiction to approve a contract covering operations by

one railroad over the lines of the other, and that Section 1 (18) of the INTERSTATE COMMERCE ACT did not apply to railroad operations under trackage rights. This Court held that the jurisdiction of the Interstate Commerce Commission was exclusive, and said:

> "So far as concerns the purpose to be attained by this legislation (the Transportation Act of 1920), there is no room for a distinction between unjustifiable expenditures for the construction or operation of new mileage on the one hand and inadequate rentals or extortionate exactions under trackage agreements on the other. The reasons for the exertion of federal authority, to the exclusion of state regulation, apply with like force to both. The Act, including Paragraph (18) (dealing with certificates of public convenience and necessity for construction of lines or abandonment of operations), and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate.
>
> " * * * * On the taking effect of the Transportation Act the state commission was stripped of power to prescribe terms for such operation. The authority of the Interstate Commerce Commission is paramount and, in respect of the operation and agreement under consideration, it is necessarily exclusive." (Parenthetical insertion ours.)

The Court of Civil Appeals, in its opinion in the present case, attempts to distinguish the TRANSIT COMMISSION case, saying that Respondent's "application for permission to terminate the contract of 1904" was denied and that no party to the case had thereafter sought "to invoke the jurisdiction of the Interstate Commerce Commission with reference to this controversy." The Court of Civil Appeals, from such statement, concludes that since the Interstate Com-

merce Commission had taken no affirmative action which would conflict with the action of the trial court, the trial court had jurisdiction of the controversy. The Court of Civil Appeals did not cite any authority in support of this conclusion. We suppose the court had in mind that line of cases holding that until Congress exercises its power to regulate certain phases of interstate commerce the States may exercise their regulatory powers. In this instance, however, the Congress *has* legislated upon the subject, and *has* given the Interstate Commerce Commission exclusive regulatory powers over trackage agreements, and the fairness of rentals thereunder. The jurisdiction of the Commission, as pointed out in the TRANSIT COMMISSION case, is exclusive. Such legislative action cast upon the party seeking authority for the abandonment of operations the affirmative and positive duty to act. Respondent wholly failed so to do. It did not file a proper application. It filed no application for a certificate. It got no ruling from the Interstate Commerce Commission nor any disclaimer of jurisdiction. All that it ever got was a letter from the Secretary (not a member of Interstate Commerce Commission) saying that the Commission had no jurisdiction over *an application for leave to terminate a contract*. That letter affirmed the Commission's power to issue a certificate authorizing abandonment of operations, but Respondent let the matter rest where the Secretary had left it.

Just as the interests of due administration of a bankrupt estate and the interests of the creditors in the protection of their rights require that exclusive jurisdiction of suits against the Trustee be vested in the court of Bankruptcy, so the interest of the public in the continued financial ability of an interstate carrier to furnish transportation and otherwise to serve the public, requires that the jurisdiction of the Interstate Commerce Commission to determine what is fair

compensation for the use of the property of one carrier by another be likewise exclusive. If the determination of such compensation were left to the courts, the amount of the compensation would be determined by different standards in each instance; it might be left to the discretion of a judge in one case and be fixed by a jury in another. There would be no uniformity between judges, no uniformity between the findings of various juries, nor any uniformity as to the rules of evidence, the facts proved or the measure of damages to be applied. In TEXAS & PACIFIC RAILWAY COMPANY v. ABILENE COTTON OIL COMPANY, 204 U.S. 426, opinion by MR. JUSTICE, later CHIEF JUSTICE, WHITE, the plaintiff sued in the Texas courts to recover the excessive part of an allegedly unreasonable tariff rate collected by an interstate carrier, although the rate charged had been filed with the Interstate Commerce Commission. The State court found the rate to be in fact unreasonable and excessive, and gave judgment for the excess to the plaintiff. On writ of error, this Court said:

> "For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforce-

ment of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the Act impossible."

The present case is shown to contain similar difficulties, if the principles laid down by Respondent are permitted to control. A jury has fixed the amount claimed by Respondent for use of the properties to August 27, 1943. That use, presumably, is still continuing. Who will fix the damages for subsequent periods? Certainly not the same jury. But if the decisions of this Court are followed, and the Interstate Commerce Commission is held to be the sole and exclusive authority, such problems no longer exist. No other rule is workable.

A recent example of the need for uniformity in matters

affecting interstate carriers by rail is found in SOUTHERN PACIFIC v. ARIZONA, — U.S. —, 89 L. Ed. 1469, decided June 18, 1945. In that case there was involved the Arizona statute limiting the length of trains to fourteen passenger or seventy freight cars. The court said:

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. * * *
>
> "But ever since Gibbons v. Ogden, 9 Wheat. (U.S.) 1, 6 L. Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority. * * * Whether or not this long recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself; or upon the presumed intention of Congress, where Congress has not spoken * * * the result is the same. * * *
>
> "Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference. * * *
>
> "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of

the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent. * * *

"Here we conclude that the state does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident. Its attempted regulation of the operation of interstate trains cannot establish nation-wide control such as is essential to the maintenance of an efficient transportation system, which Congress alone can prescribe. The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern. To this the interest of the state here asserted is subordinate."

To hold that the State Court may fix the compensation for the use of trackage of one interstate carrier by another interstate carrier would lead to the application of at least forty-eight different sets of rules of evidence, forty-eight different laws of contract, and forty-eight different sets of rules as to the measure of damages. The resulting conflict and confusion in cases of this nature would render the enforcement of the principles of uniformity required by the Interstate Commerce Act impossible.

Conclusion

There is something fundamentally wrong in the judgment

of a State Court which arrogates to itself jurisdiction of an action to adjudicate property rights of the Trustee of an interstate railroad, in reorganization under Section 77 of the BANKRUPTCY ACT, and to enjoin the operations of the Trustee in bankruptcy over property in the custody of the court which appointed him.

There is something fundamentally wrong in the judgment of a State Court which disregards the settled legislative and judicial policy of the nation entrusting the public interest in interstate carriers by railroad to the Interstate Commerce Commission, and which substitutes a rule of damages fixed by court and jury and varying in each forum and in each case, for the judgment of that expert administrative agency "appointed by law and informed by experience" as to what is a fair compensation for the use of the tracks of one interstate carrier by another such carrier.

There is something fundamentally wrong in any judgment which treats a Trustee in bankruptcy (or anyone else) as a trespasser upon property which he cannot abandon without being subjected to a fine of $5000 per day, or imprisonment for three years.

PETITIONERS respectfuly pray that this Honorable Court reverse in all things the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and for such other orders and relief as may be appropriate.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 42

GUY A. THOMPSON, TRUSTEE,
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, *Petitioners*,

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

PETITIONERS' REPLY BRIEF

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SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	1
COUNTER-POINT ONE	2
COUNTER-POINT TWO	5
COUNTER-POINT THREE	6

LIST OF AUTHORITIES

Bennette v. Lewis, 176 S.W. 660	9
Continental Bank & Trust Company v. Chicago R. I. & P. Ry. Company, 294 U.S. 648	8
Ex Parte Baldwin, 291 U.S. 610	9
Isaacs v. Hobbs Tie & Timber Company, 282 U.S. 734	8
McNulta v. Lochridge, 141 U.S. 327	8
Murphy v. John Hoffman Company, 211 U.S. 562, 569	7, 8
Palmer v. Larchmont Manor Co., 30 N.E. (2d) 599, 284 N.Y. 288	10
Warren v. Palmer, 310 U.S. 132	9

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PETITIONERS' REPLY BRIEF

For the sake of brevity this reply will be couched in memorandum form and will follow the headings in Respondent's brief. Simple page references are to that brief.

Statement of the Case

The letter referred to as support for the statement made

in Paragraph 1 (p. 1) was not admitted in evidence but was expressly excluded (R. 159-162).[1]

If the trial court lacked jurisdiction over the subject matter, as Petitioners contend, the delay mentioned in Paragraph 2 (p. 1) was immaterial.

Counter-Point One

In the first sentence under this heading (p. 2) mention might have been made of the Commission's jurisdiction with regard to abandonment as well as extension of lines, under trackage contracts.

Reference is made (p. 2) to the amendment of Section 5 by the Transportation Act of 1940. Paragraph (1) of Section 5, like many other paragraphs of the Act, begins with or contains the words "it shall be *unlawful*." Paragraph (2) begins "It shall be *lawful*, with the approval and authorization of the Commission * * *." Paragraph (4) begins with this statement: "It shall be unlawful for any person, except as provided in Paragraph (2), to enter into any transaction within the scope of Subparagraph (a) thereof * * *." In Paragraph (11) it is stated that "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction and approved by the Commission thereunder shall have

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[1] Other departures from the record include: Note 2 on p. 4, the statement (p. 12) that Petitioner "began moving traffic into Corpus Christi over the lines of * * * San Antonio, Uvalde & Gulf Railroad Company;" the statement (p. 12) that "the compensation (which we distinguish from reimbursement of expense) paid to Respondent * * * was fixed on a wheelage basis" (see R. 139); the irrelevant claim (p. 13) that Respondent had "small assets" and makes "contributions" to Petitioners; the imaginative suggestion, without foundation in fact (Note 5, p. 20), that Petitioner Trustee may have made a secret and unsuccessful application for injunction to the Court of Bankruptcy.

full power * * * to carry such transaction into effect * * *."
Paragraph (18) of Section 1 was amended by the same Act (54 Stat. 902) but only by adding the following sentence—"Nothing in this paragraph or in Section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side-tracks."

The 1940 amendments, therefore, did not restrict or affect any power of the Commission under Section 1(18) respecting abandonments; nor did the 1940 amendment of Section 5 authorize a carrier even with the approval of the Commission, to *give up* or *be divested of* trackage rights. Apparently, all questions growing out of abandonments, actual or proposed, must be determined under Section 1(18). In view of Section 5(4), as amended in 1940, we are by no means certain that Section 5(2) "has no bearing on the present situation" as claimed by Respondent (p. 2). It is not inconceivable that by insisting upon a money judgment against Petitioners in the present case, fixing for a specific time its compensation for the joint use of a part of its railroad line by Petitioners, Respondent may have violated the quoted part of Section 5(4).

Mention is made (p. 3) of "the grave constitutional question" which would be raised by the construction of the Act contended for by Petitioners; but we are not told what the question is; nor are we told, with cited authorities, what is the "uniform practice of the Commission" mentioned in the same connection.

A refusal by the Commission to approve long-term trackage contracts without provisions for termination on notice (p. 3) is understandable. Reading into such a provision the requirement of Section 1(18) of the Act that operations by the user may not be abandoned without a certificate

from the Commission, the Commission is reasonably assured by such a provision that it will have an opportunity to review the propriety of the arrangement in case conditions should change materially. In the event of such a change, the party injured can probably be depended upon to give notice of termination and thus by application for a certificate, bring the matter to the Commission's attention. The inconsistency asserted by the Respondent (p. 3) is not apparent to us, nor do we contend, as asserted (p. 3) that "the Commission has exclusive authority to fix compensation," nor that "such a contract can be terminated only in abandonment proceedings."

We do contend that jurisdiction to determine the fair rental or compensation for the use by one interstate carrier of a line of railway owned and used by another interstate carrier is vested exclusively in the Interstate Commerce Commission. We do not contend that the Commission has any power to make a contract between such parties, but the amount of rental is clearly within the Commission's jurisdiction since it may attach or impose any conditions it desires upon the issuance of a certificate of public convenience and necessity, including a condition that the rental shall not exceed or shall not be less than the amount which the Commission determines to be fair to both parties and to the public.

From what is said later (pp. 13-14) it is apparent that counsel for Respondent understand our real contention. For instance they say "* * * the Commission may refuse to grant authority except on condition that the parties revise their agreement in accordance with the Commission's views. The parties are then free either to abandon the proposed contract and operations entirely or to revise their contract to meet the Commission's contentions. In neither case can it properly be said that the Commission fixes the compensa-

tion. The Commission does no more than present the parties with a choice, and the choice they make is their own voluntary action." In the present case if Respondent, about the time of serving its notice of termination, had applied to the Commission for a certificate, authorizing Petitioners to abandon their operations over Respondent's line, the Commission, if it had deemed the rental inadequate, could have granted the certificate upon condition that it should not be issued if, within a specified time, Petitioners should file with the Commission their written agreement to pay an additional rental at least equal to the minimum regarded by the Commission as fair. No reason appears why we should assume that the Commission on the merits would not grant an application for abandonment if the rental was, in fact, inadequate.

We do not "ignore" the distinction "between the termination of a contract and the termination of operations" (p. 5). We argue that in the circumstances presented by this Record the contract of 1904 could not be and has not been terminated, because no certificate of abandonment has been issued by the Commission under Section 1(18) and, therefore, the rights of entry and operation conferred on the Petitioners by the contract are still in existence.

It will be noted that although the Transportation Act, 1920, has been on the books for more than a quarter century and has been discussed in scores of decisions by this Court, Respondent, to support its contention about the proper construction of Section 1(18), or in refutation of Petitioners' contentions (pp. 2-17), cites practically no decisions except those of the Interstate Commerce Commission and the lower Federal courts.

Counter-Point Two

Respondent says we are "unable to point to any specific authority in the statutes" for our contention (p. 15).

Neither could the plaintiff in error in TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL COMPANY, 204 U.S. 426. Examination of decisions of this Court construing the Interstate Commerce Act will reveal that many firmly settled conclusions depend on inference rather than on specific provisions of the statute.

Complaint is made that Petitioners "suggest no procedure whatever" to be followed by Respondent (p. 15), and that Petitioners "are interested only in perpetuating as long as possible the excessively favorable terms of the contract" (p. 16). If Respondent had been diligent in resorting to the Commission (as Petitioners long ago suggested) for a certificate of public convenience and necessity under Section 1 (18), it might long ago have secured relief. In any event, it would not, at this late date, be in doubt about whether it has a sufficient interest in the subject matter to prosecute an application for such a certificate, and it might, with better grace, claim that Petitioners are trying to prolong unduly the life of the contract.

As to the recognition extended by Congress (p. 16) to the competence of courts and juries "to pass upon the proper compensation to be paid by one railroad for the use and facilities of another" see the INTERSTATE COMMERCE ACT, Sec. 5(2), previously cited by Respondent (p. 2).

Counter-Point Three

Respondent (p. 17) challenges Petitioners' statement (Brief, p. 12) that this suit had for one of its purposes the cancellation of the contract. In this, Respondent is technically correct and we accept the correction. It would have been more accurate if we had said, as we did on p. 10, that the relief sought required a judicial determination that Respondent had cancelled or terminated the contract; that such

termination was valid and effective and that, bottomed thereon, Respondent was entitled to recover.

Respondent claims (pp. 17-18) that the main purpose of its suit was merely to secure money damages, and that the granting of the injunction would not have interfered with any property in possession of the Trustee. The property need not be in the technical possession of the debtor, the Trustee, or the Court of Bankruptcy. It is sufficient if it is *under the control* of the Trustee. As was said in MURPHY V. JOHN HOFFMAN COMPANY, 211 U.S. 562, 569, "The Court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or *control* of the property." Irrespective of any question of technical *title* the Bankruptcy Court certainly had control of operations on and a large measure of possession of the property. The Petitioners' employees went upon it daily in the operation of their trains (R. 9-10, 12, Par. 2-4), and Respondent's first prayer for relief was for an injunction to put a stop to such operations (R. 46).

Respondent suggests (p. 18) that the trial court may have taken the plea to jurisdiction "along with the case on its merits," and "for aught that appears in the record" the "court's denial of injunctive relief may as well have been based on its own finding of want of jurisdiction as upon the merits." However, the Record (p. 103) shows that the motion to stay and the plea to the jurisdiction were separately heard, before the selection of the jury for the trial. The Record also shows:

> "Testimony closed on motion to stay and plea to jurisdiction * * *
>
> "The Court: Gentlemen, I am going to overrule the motion to stay and plea of jurisdiction, and we will go to trial in the morning at 9:30 o'clock" (R. 86).

On August 26, 1943, the Court overruled the motion to stay and the plea to the jurisdiction of the trial court (R. 69). The charge of the Court and the verdict of the jury are dated the following day (R. 78). The trial court plainly ruled that it did have jurisdiction, and its denial (R. 85, 91) of Respondent's prayer for injunction (R. 46) was an adjudication of that issue on the merits.

The matter of jurisdiction over subject matter may be raised at any time without regard to due order of pleading. The nature of the case pleaded by Respondent determined this matter of jurisdiction. EX PARTE BALDWIN, 291 U.S. 610. The relief ultimately given or denied cannot change the nature of the case pleaded. Neither the trial court (R. 69) nor the Court of Civil Appeals (R. 189-198) thought the motion or plea was filed too late.

Respondent states broadly (p. 20) that this Court in MCNULTA V. LOCHRIDGE, 141 U.S. 327, interpreted Section 66 of the JUDICIAL CODE to confer an unlimited right to sue in the state courts with respect to the Trustee's "contracts, misfeasances, negligences and liabilities." The case must be interpreted in the light of the questions involved. It was a suit to recover against a receiver of a railroad for an ordinary crossing accident which occurred during the tenure of a prior receiver appointed in the same proceeding. No one questioned the general right of the plaintiff to sue in the state court. The sole question was whether the receiver actually sued was liable to suit under Section 66 for an accident occurring during his predecessor's term of office. The broad statements made in that early case have been limited by later decisions such as MURPHY V. JOHN HOFFMAN COMPANY, supra, ISAACS V. HOBBS TIE & TIMBER COMPANY, 282 U.S. 734; CONTINENTAL BANK & TRUST COMPANY V. CHICAGO R. I. & P. RY. COMPANY, 294 U.S. 648; EX PARTE

BALDWIN, 291 U.S. 610; and WARREN v. PALMER, 310 U.S. 132.

Respondent labors greatly (pp. 19-30) to make out its right to sue under Section 66 of the JUDICIAL CODE (Title 28 U.S.C., Sec. 125). In addition to what we said on this subject in our Brief (pp. 14-16), it may be suggested that no matter how many acts or transactions a Federal receiver or trustee may engage in with or in respect of property of the bankrupt or debtor, no suit, consistently with the decisions last above cited, can be brought against him, except in or by the leave of the court which appointed him, if the effect thereof is to challenge his title or right to possess or control the property entrusted to him by the court, or to interfere with an orderly reorganization under Sec. 77 of the BANKRUPTCY ACT.

Respondent cites BENNETTE v. LEWIS, 176 S.W. 660. If the evidence had there shown, as it did not, that previous to the bankruptcy the party claiming the timber had been going daily upon the land and cutting a portion of the timber growing thereon (as here, the Trustee's train crews were going daily upon Respondent's tracks in the use of the property and in furtherance of the business committed to the Trustee by the Court which appointed him), the Court would probably not have held that the Trustee was not in possession of the property.

Respondent claims (p. 27) that the present suit was as much one for damages growing out of the operation of the Trustee's trains "as if one of Petitioners' locomotives had negligently set fire to some portion of Respondent's right-of-way. The kind of claim is the same whether the damage be accomplished quickly by means of fire, or more slowly by means of the pounding of Respondent's roadbed * * *." Respondent sought to recover "the reasonable value of the

use" of the property (R. 45-47). The charge of the Court (R. 76-78) did not require the jury to find the damage resulting from the pounding of the roadbed but "the reasonable value per day of the use by the defendant * * * to (of) the railroad tracks and facilities belonging to plaintiff."

Respondent complains of the hardship that may result if it is not permitted to sue in the State court but is required, instead, to resort to the Court of Bankruptcy. Whether hardship results or not, the decisions of this Court, heretofore cited by Petitioners (Brief, pp. 7-13) consistently hold that only the Court of Bankruptcy has jurisdiction to try the title to property in the custody of that Court, or to entertain an action which seeks to enjoin the Trustee from conducting his operations as Trustee.

Respondent asserts (p. 26) that Petitioners' rights have been affected by waiver, due to the alleged delay in filing the motion to dismiss and the plea to the jurisdiction. In no event can any doctrine of waiver be carried beyond the proposition that while the debtor may have waived its right to enforce the stay order entered in its favor (which is not admitted to be the case here), no amount of waiver by the Trustee, as held in PALMER V. LARCHMONT MANOR CO., 30 N.E. (2d) 599, 284 N.Y. 288, could confer jurisdiction on any court, except the one from which he drew his appointment, to try the title to property committed to his possession or to enjoin him from conducting his operations as Trustee.

Respondent asserts that it "is in undisputed possession of" the property covered by the contract of 1904, and its "title and possession is clear" (p. 29). One of the reasons why the State courts had no jurisdiction is the claim of Petitioners, supported by evidence above referred to, that Respondent's title is encumbered by the rights which it granted by the trackage contract and that its possession is not and has not been exclusive but joint with the several Petitioners.

The desperation of Respondent's counsel is shown by the statement (p. 30) that "Respondent cannot *lawfully* prevent Petitioners' *invasion* of its property." Since when has it been impossible in this country for the courts to prevent, and lawfully, an invasion of and trespass on property? Only since Respondent's counsel invented the novel conception of a trespasser who is forbidden on pain of felony to leave the property trespassed upon.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 42

GUY A. THOMPSON, TRUSTEE,
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, *Petitioners*,

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

On Writ of Certiorari to The Court of Civil Appeals For the Fourth Supreme Judicial District of Texas

COMMENTS ON BRIEF OF INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

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IN THE

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GUY A. THOMPSON, TRUSTEE,
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COMMENTS ON BRIEF OF INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

In its brief Amicus Curiae the Interstate Commerce Commission undertook to discuss two questions: "(1) The effect of Section 1(18) on the 1904 contract, and (2) The right of the state court to pass on the reasonableness of the compensation for the use of respondent's line by petitioner." In the course of its discussion the Commission clearly affirms two propositions previously laid down by Petitioners:

(a) That whether the notice of termination did or did not have the effect of ending the 1904 contract, Petitioner Trustee was obliged by Section 1 (18) of the Interstate Commerce Act to continue his operations over the facilities of Respondent after the date when the notice is claimed to have taken effect.

(b) That an application to the Commission for a certificate of public convenience and necessity, authorizing the abandonment of such operations by Petitioner Trustee might have been, and now may be, filed and prosecuted by Respondent, as well as by Petitioners.

1. The Commission, in its discussion of the first question which it undertook to discuss, fell into some errors and in the end leaves us in grave doubt about its actual position. It first assumed that which it set out to establish. It stated that the trial court "held that the 1904 contract was legally terminated." It then said, immediately, "The contract having been legally terminated * * * ."

Proceeding thereafter to discuss this question already disposed of by assumption, the Commission cited CENTRAL NEW ENGLAND RAILWAY CO. v. BOSTON & A. R. CO., 279 U.S. 415. But it omitted wholly to note that the contract in that case contained no provision whatever for termination by notice or at the option of either party. There the question was whether an abandonment certificate of the Commission had the effect of, or could substitute for, a termination clause; while here the question is whether a termination clause, written by the parties, had been slightly modified by subsequent legislation.

The Commission also assumed that the notice of termination was given because Respondent thought the rentals or compensation provided for in the contract of 1904 were in-

adequate. Respondent itself gave an entirely different reason for serving the notice (R. 42).

Apparently without assigning any reason for the conclusion, the Commission then asserted its agreement with the trial court "that the 1904 contract was terminated" by the notice alone. However, it immediately contradicted that statement by adding that the contract was terminated only "in so far as the parties could legally terminate it." How far that was, the Commission did not say, except for the inescapable inference to be drawn from its next statement that "operations *thereunder*" (that is, under the contract) "could not be discontinued without a certificate from the Commission."

2. Having thus carefully qualified its agreement with the trial court on the termination of the 1904 contract, the Commission proceeds to a discussion of its second question. At the outset of that discussion the Commission says: The 1904 contract "having been legally terminated, as found by the lower court, the question arises as to who can accord it full relief, Commission or Court." To make doubly sure that even this language should not be construed to place the Commission in unqualified agreement with the trial court, it adds: "It is undoubtedly true that the 1904 contract having been legally terminated in 1941, *so far as* within the power of the parties to terminate it, subsequent operations over the line of Respondent by Petitioner would be under a new trackage agreement, which, under the 1940 amendment to Section 5, requires Commission approval."

The sentence just quoted would be a substantial repetition of what was said on oral argument by counsel for Petitioners if it were paraphrased to read "If it be contended that the 1904 contract was legally terminated in 1941, it would necessarily follow that operations over the line of Re-

spondent by Petitioner would be under a new trackage agreement, which, under the 1940 amendment of Section 5, requires Commission approval." In other words, the law required a continuance of the operations which had been conducted under the 1904 contract. Thus, continuing operations either were or were not conducted under the 1904 contract. If they were, as contended by Petitioners, then the 1904 contract is still in existence and the judgment below was wrong. If the 1904 contract, as contended by Respondent and held by the courts below, was absolutely terminated in 1941, then the operations thereafter conducted by Petitioners, pursuant to the requirements of law, must have been conducted under *a new arrangement*. That arrangement was not; and was not evidenced by, an express contract. The law must imply a contract in such a case, because the conduct of the Petitioners was not wrongful or tortious. The Trustee on the contrary, by continuing his operations, was yielding full obedience to the mandate of the law. In such a situation the Commission was undoubtedly correct in declaring that the "new trackage agreement," implied though it might be, would require Commission approval.

After conceding that the new arrangement, if there was one, could not, consistently with the requirements of Section 5 of the Interstate Commerce Act, be placed in effect without the approval of the Commission, that body, in its brief, concludes that the Commission's power with reference to trackage arrangements under Section 5 being prospective only, it was entirely proper and lawful for the Respondent, after by-passing the Commission, to resort in the end to a State court, because the Commission had no power to look backwards and do anything with respect to trackage operations which had already been conducted without its consent or approval.

We can find no other ground asserted by the Commission

as a basis for its conclusion on the second question which it undertook to discuss. It is difficult to believe that the Commission and its counsel have overlooked or forgotten the many remedies, civil and criminal, which the Act places at the disposal of the Commission.

If two carriers should enter into a one-year trackage agreement without any resort to or approval by the Commission, and if at the end of the year the user should be sued by the owner for the agreed rentals, the Commission, if asked to express its views upon the rights of the parties, might as well say that it is entirely proper for the Court to grant relief because the Commission's power is prospective only. The operations have been completed. The Commission can do nothing about it, and the Court might as well proceed to judgment.

Such an attitude may conceivably express the views of some individuals connected with the Commission, but it does not reflect the temper of that Commission whose actions we find recorded in decisions rendered by this Court during the last half century, nor, in our opinion, does it reflect the policy declared in the Interstate Commerce Act.

ROBERT H. KELLEY,
Attorney for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1000

GUY A. THOMPSON, TRUSTEE OF THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, DEBTOR, AND THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY,

Petitioners,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. G. ECKHARDT,
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INDEX

	Page
Appendix	36
Argument:	
Under Counter-Point One	10, 12
Under Counter-Point Two	10, 20
Under Counter-Point Three	11

AUTHORITIES:

Cases Cited:

Anderson et al v. *Scandrett et al*, 19 Fed. Sup. 681, (HOLDING, trustees acting under Sec. 77 (b), Bankruptcy Act, may be sued outside Bankruptcy Court for claims arising out of carrying on business) 10, 14

Central New England R. R. Co. v. *Boston Co.*, 279 U. S. 415, 49 Sup. Ct. 358, (HOLDING, abandonment of operations by operating company authorized under Sec. 1, Par. 18, Transportation Act, no impairment of contract with the owning carrier under which operations had been conducted, and no defense to a suit upon the contract after abandonment) 1, 23

Chicago & Alton v. *T. P. & W.*, 146 I. C. C. Reports 171, 182, (HOLDING, jurisdiction of I. C. C. under Sec. 1, Pars. 18 to 20, Transportation Act, over operations only and not contract governing operations) 11, 12, 23

Gaston v. *Rutland Co.*, 35 Fed. (2d) 685, (HOLDING, exercise by receivers of operating carrier of right to reject its contract with owning carrier permitting operations and fixing compensation, is rejection of entire contract, and requirement by Sec. 1, Par. 18, Transportation Act, that receivers continue the operations is no defense to owning carrier changing and fixing rentals after rejection of contract) 11, 24

Powell v. *United States*, 300 U. S. 276, 57 Sup. Ct. 470, (HOLDING, remedy of carrier objecting to tariffs applicable to operations not authorized by Sec. 1, Par. 18, Transportation Act, is to attack order approving tariffs, as such carrier is not authorized to make any applications with respect to such operations) 11, 26

Page

Texas & Pacific v. *G. C. & S. F.*, 270 U. S. 266, 46 Sup. Ct. 263, (HOLDING, carrier adversely interested to commencement of operations by another carrier is not entitled to institute an application under Sec. 1, Par. 18, Transportation Act, with respect to the proposed operations) 11, 26

Statutes Cited:

Judicial Code, Sec. 66, 36 Stat. 1104, Title 28, Sec. 125, U. S. C. A. (Expressly authorizing suits against trustees and receivers appointed by Courts of the United States arising out of carrying on the business to be prosecuted in any court having jurisdiction of the parties and subject matter, judgment to be certified to appointing court for administration) 16

Sec. 77 (j), Act relating to Bankruptcy, as amended August 27, 1935, 49 Stat. 911, 11 U. S. C. A., Sec. 205 (j), (Expressly excepting from stay orders suits on claims for damages caused by operations of trains). 10, 14

Sec. 1, Pars. 18 to 20, Act of Feb. 28, 1920, 41 Stat. 477, 49 U. S. C. A., (Making unlawful after Feb. 28, 1920, for any carrier engaged in interstate commerce to either commence or abandon operations without having first procured from I. C. C. a certificate that public convenience and necessity permits such operations to be commenced or abandoned) 11, 21

Sec. 3, Par. 4, Act of Feb. 28, 1920, 41 Stat. 477, Sec. 3, Par. 5 (f), as amended Sept. 18, 1940, 54 Stat. 902, 49 U. S. C. A., Sec. 3, Par. 5, (Authorizing carrier desiring to operate on terminals and main line for reasonable distance of another carrier to apply to I. C. C. for a permit to so operate, which may be granted in event I. C. C. finds public convenience and necessity requires such operations and that they will not unreasonably interfere with operations of the owning carrier, and in event the two carriers may not agree upon compensation, I. C. C. may fix rentals subject to court review) 12, 33

Page

Court Order:

Stay Order entered by Bankruptcy Court Dec. 2, 1935. (Cancelling previous stay Orders not conforming to exceptions contained in Sec. 77 (j), Reorganization Act) 10

Authorities Cited by Petitioners, Distinguished:

A. T. & S. F. v. *Railroad Commission*, 283 U. S. 380, 51 Sup. Ct. 553 25
Ex Parte Baldwin, 291 U. S. 610 16
In Re C. & E. I. Co., Gourley v. *Wham*, 121 Fed. (2) 785 20
Palmer v. *Massachusetts*, 308 U. S. 79 30
Taylor v. *Santa Fe*, 34 Pac. (2d) 1102, 38 N. M. 457 ..... 17, 28
Texas & Pac. Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 32
Transit Commission et al v. *U. S.*, 289 U. S. 121 ..... 30, 32
Bankruptcy Act, Sec. 77 (0), Title 11 U. S. C. A. Sec. 205 (0) 30
Conclusion 34

Counter-Points:

ONE: Exclusive jurisdiction of this suit not vested in the Bankruptcy Court 12
TWO: The contract which gave Respondent's consent to operations for compensation therein fixed was subject to termination upon notice, which was given, and its termination may not be defeated and compensation fixed in 1904 projected by Petitioners so long as they continue their operations 20
THREE: No statute vests in I. C. C. exclusive jurisdiction to fix rentals for operating carrier's use of owning carrier's property, and its jurisdiction with respect to the operations having never been invoked, it has no jurisdiction over the rental controversy here between Petitioners and Respondent 29
Prayer 33
Signatures 35
Statement of Case 1
Summary of Argument 12

Page

I.

(a) Neither statute nor comity vests in primary court of bankruptcy or receivership proceedings exclusive jurisdiction over claims not provable at date of bankruptcy or arising out of act of receiver or trustee in carrying on business 16

(b) Stay Order by Bankruptcy Court entered Dec. 5, 1935, expressly authorized suit on claims against Trustee arising out of operation of trains 13

(c) This suit to recover reasonable value of use made of Respondent's property by Trustee in operation of trains, and neither suit nor judgment causing any interference with property or its use in custody of Bankruptcy Court, exclusive jurisdiction thereof is not in the Bankruptcy Court 17

(d) Orders of the Bankruptcy Court effectively empowered Petitioners, in their discretion, to answer and defend suits on the merits, (provided the judgment laid no burden of any sort upon any property in the custody of the Bankruptcy Court, nor attempted to require payment without consent of said Court), and thereby consented, in event of such answer, that the State Court proceed to here exercise jurisdiction. Therefore, Petitioners having so answered, and neither the suit nor judgment having interfered with or imposed any burden upon any property or its use in the custody of the Bankruptcy Court, but having ordered the judgment certified to the Bankruptcy Court as a claim in administration, said judgment was rendered by the State Court in exercise of its lawful jurisdiction 19

II.

(a) The operations by Petitioners commenced under a contract made in 1904, which fixed a basis of compensation for the use of Respondent's property, all subject to an unqualified termination clause upon notice; Petitioners accepted and operated under contract for several years and became bound by all its terms, including the notice of termination, which was duly given 20

Page

(b) Sec. 1, Par. 18, Transportation Act, imposed the duty upon operating carriers to continue all operations conducted when said Act became effective until abandonment should be permitted by the I. C. C., but did not deal with nor refer to existing contracts fixing compensation to the owning carrier; therefore, no basis for contention said Act prevented Respondent from exercising its contract right of termination until after Respondent procured from I. C. C. a certificate which would permit Petitioners to abandon their operations 24

(c) Petitioners clearly evidenced their intention to not voluntarily abandon the operations, and there is no power in the I. C. C. or elsewhere to compel abandonment in event a permit to do so should issue. Therefore, the contention Respondent should be required to procure such certificate before it may exercise its right of termination is not substantial 25

(d) The contract which consented to commencement of operations in 1904 and fixed the basis of compensation for use of Respondent's property, is wholly severable and distinct from the operations conducted thereon by Petitioners, and required by Sec. 1, Par. 18 to continue until a certificate permitting abandonment by Petitioners issue by the I. C. C.; therefore, no merit in contention by Petitioners that compensation fixed in 1904 terminable contract continues so long as they continue operations 25

III.

(a) Only jurisdiction of I. C. C. over amount of rentals due by an operating carrier for use of owning carrier's property arises in connection with application by operating carrier for permit to use owning carrier's property under Sec. 1, Pars. 18-20, or Sec. 3, Par. 4, Transportation Act, and no statute confers original and independent jurisdiction in the I. C. C. solely over a controvery as to rentals 26

Page

(b) Before filing this suit Respondent invoked jurisdiction of I. C. C. over this contract thru an application for approval of termination; I. C. C. declined to file application on ground its jurisdiction is solely over operations by Petitioners who filed no application; Petitioners refused to join in any application or to make an application of their own; therefore, no jurisdiction in I. C. C. with respect to the rentals 6,30

(c) Operations conducted by Petitioners having commenced prior to Transportation Act and now protected by its provisions, said jurisdiction of I. C. C. with respect thereto having never been invoked, no statute vests I. C. C. with any jurisdiction to determine the controversy between Respondent and Petitioners as to the reasonable value of the use made of Respondent's property by Petitioners in continuing said operations 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1000

GUY A. THOMPSON, TRUSTEE OF THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, DEBTOR, AND THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY,

Petitioners,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Respondent The Texas Mexican Railway Company herewith respectfully tenders the following Brief in reply to the Petition for Certiorari and its Supporting Brief heretofore filed in the above styled and numbered proceeding.

Statement of Case

1. This suit has resulted from the execution of a contract between Petitioner, St. Louis, Brownsville & Mexico

Railway Company, and Respondent, The Texas Mexican Railway Company, executed November 1, 1904, extending to said Brownsville Company operating privileges on the terminals of Respondent in Corpus Christi and in Robstown, Texas, and its main line between said two points, a distance of approximately 16 miles. The only provision of the contract material here is its termination clause set out in Appendix, page 37, Par. (2). It appears from the Record that in negotiations leading up to the contract Respondent tendered a contract for a five-year term with a sixty-day cancellation clause, and the Vice President and General Manager of said Brownsville Company on August 29, 1904 made a counter tender of a contract for a fifty-year term, with a twelve-months termination clause, assigning as a reason twelve months would be required after notice for the Brownsville Company to build its own line. (S. F. Vol 1 pages 160-161, Record page 161; for Letter see Appendix page 36, Par. (1).)

2. Operations continued under the contract until 1933 when the debtor became party with some seven other subsidiary railroad corporations of the Missouri Pacific Railroad Company to a reorganization proceeding instituted under Sec. 77 of the Bankruptcy Act in the United States District Court at St. Louis (S. F. pages 23-25, Record pages 117-118). Petitioner Trustee is common Trustee for all. Sec. 77 was enacted March 3, 1933, and the bankruptcy proceeding was filed March 31, 1933 (S. F. 8, Record p. 107).

3. In said proceeding the Bankruptcy Court entered an order May 9, 1943, specifically authorizing the debtors to institute and prosecute and,

> "likewise to defend or liquidate by written agreement or consent judgments, any claims, actions, proceedings or suits now pending against any of said debtors

or which may hereafter be asserted or be brought in any court or before any officer, department, commission or tribunal to which any such debtors is or shall be a party, but no payments shall be made by the debtors in respect of any such claims accruing prior to the respective dates of approval of the petitions of the respective debtors herein or in respect to any actions, proceedings, or suits on such claims without authority or direction of this Court, and no action taken by the debtors in defense or liquidation of any such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon or right in the property or funds in the possession of the debtors that otherwise would not exist." (S. F. 29-30, Record 122.)

4. On June 22, 1933, the Bankruptcy Court entered an order vesting in the Trustees,

"all of the powers, rights and privileges heretofore granted to or conferred upon the respective debtors, or any of them, pursuant to any and all of the orders heretofore entered by this Court in this proceeding, and each and all of the orders heretofore entered in this proceeding shall, with respect to the Trustees and the property in their possession, be of like force and effect as though said Trustees were therein specifically named in place of said respective debtors, all of said orders being hereby incorporated in and made a part of this order by reference." (S. F. 16, Record 112.)

5. On November 14, 1933, the Bankruptcy Court entered an order staying all suits until after final decree in the cause.

"(other than claims for injuries to or death of employes) * * * which have for their object the enforcement of any lien or judgment against the property of the debtors in the hands of the Trustees * * *." (S. F. 32-33, Record 124.)

6. On December 2, 1935, because existing stay orders did not conform to Subdivision (j) of Sec. 77 of the Act relating to bankruptcy as amended August 27, 1935, 49 Stat. 911, the Bankruptcy Court repealed all stay orders and stipulated the following exceptions:

> "Provided, however, that suits or claims for damages caused by the operation of trains, buses or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated." (S. F. 34, Record 125.)

7. The Bankruptcy Court entered its order May 9, 1933, allowing the Trustee until October 31, 1933, in which to disaffirm contracts, to be evidenced by notice in writing to the opposite party (S. F. page 29, Par. 3, Record page 121). No notice was given and the contract was continuously acted upon until October 31, 1940. It is admitted that Respondent gave notice of termination twelve months after Noyember 1, 1940. Said notice was ignored by Petitioners. (Appendix Par. 5 p. 39.)

8. About August, 1941, Respondent tendered its application to the Interstate Commerce Commission, copies of which were delivered to Petitioners, asking that the termination be approved. Said application is copied in the Record, S. F. Vol. 1, pages 142-157, Record pages 175-185. The Chief Operating Official in Texas was H. R. Safford (S. F. Vol. 1, page 169, Record page 29). The Secretary declined to file and returned said application, stating in substance that jurisdiction of the Commission under Sec. 1 (18) of the Interstate Commerce Act extended only to abandonment of operations by the St. Louis, Brownsville & Mexico Company, which had filed no application, a copy of which letter went to Mr. Safford. (Appendix page 37, Par. (3); S. F. Vol. 1, pages 157-158, Record page 185.)

9. About November 5, 1941, Respondent wrote Mr. Safford among other things that there had been no expression of intentions with respect to termination, and that Respondent hoped Petitioner would join in an application to the Interstate Commerce Commission for approval of cancellation of the contract (S. F. Vol. 1, page 96, Record page 157; Appendix Par. 4, p. 38).

10. About November 5, 1941, Respondent wrote Mr. Safford that as Petitioner was still operating and the cancellation became effective November 1, 1941, from that date the charge for using Respondent's facilities would be $500.00 per day. (Appendix page 38, Par. (4); Tr. Par. 21, p. 40, Record page 33).

11. About November 29, 1941, Mr. Safford wrote rejecting any charge, "except such as may be in accordance with the contract of November 1, 1904, as supplemented or amended to date" (S. F. Vol. 1, p. 183, Record p. 158).

12. Since November 1, 1941 Petitioner Trustee has continued his use of Respondent's property from Corpus Christi to Robstown in operating his trains (S. F. Vol. 1, page 175, Record page 154).

13. Petitioner does not intend to make any application to the Interstate Commerce Commission for a certificate permitting abandonment of the operations, and no such application was ever filed (S. F. Vol. 1, Par. 26, page 98, Record page 159). He intends to continue the operations "so long as may be required by law" (S. F. 97-98, Record 158-159).

14. Respondent thereafter on May 25, 1942, instituted this suit in the 94th District Court of Nueces County, Texas, alleging the contract; its termination; continued use of the property by Petitioners; their refusal to pay any compensation except as fixed by the contract; and

prayed for injunction, damages and general relief (S. F. 37-52, Record pages 127-137).

15. Petitioners jointly answered solely to the merits on June 20, 1942, with the prayer,

> "Having fully answered, these Defendants (Petitioners) say that Plaintiff (Respondent) is not entitled either at law or in equity to the injunctive relief sought nor the sums of money demanded, nor any of the relief prayed for in its petition, and these Defendants pray judgment that Plaintiff take nothing by its action against them, and that they and each of them go hence without day and recover of and from Plaintiff their costs." (Tr. 11, Record 9.)

16. On the same day Petitioners invoked the jurisdiction of the Court by making demand upon Respondent for Admissions of Facts (Tr. 12-15, Record 9-11), which was responded to July 2, 1942 (Tr. 16-18, Record 12-14).

17. Various terms of the Court passed between June 20, 1942 and July 30, 1943 (S. F. Vol. 1, pages 122-123, Record page 163), and on July 30, 1943, Petitioners filed their first plea or motion of any sort challenging jurisdiction of the Court or asking it to stay this suit (Tr. 58-67, Record pages 48-55, and Tr. 68-76, Record pages 56-63).

18. The plea to the jurisdiction then filed by Petitioner Trustee was expressly conditioned to be without waiver of his right to go to the Bankruptcy Court or any other court for relief against prosecution of this suit (Tr. 58, Record page 48).

19. A substantial part of the relief sought by Respondent was fixation of compensation for the use of Respondent's tracks and facilities by Petitioner Trustee in the operation of his trains (Tr. Pars. II and III, Motion by Petitioners for Rehearing in the Court of Civil Appeals, Rec-

ord pages 200-201; Tr. Par. VIII, pages 55-56, Record pages 46-47; Tr. Par. V, pages 51-53, Record pages 43-44).

20. Petitioners never sought prior to entry of final judgment to strike from the petition the count and prayer for injunction, but thruout the plea and prayer sought dismissal or stay of the suit as a whole (Tr. Par. 15, page 66, Record p. 55); Tr. Par. 15, page 75, Record pages 62-63; Motion for Peremptory Instructions, Pars. 1 and 2, Tr. 87, Record page 70; Tr. 89-92, Record pages 71-74).

21. Petitioners pleaded the ultimate stay order (which conforms to Sub. (j) of Sec. 77 of the Act relating to bankruptcy as amended August 27, 1935) to be:

> "That commencement or continuation of suits against any of debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings; provided, however, that suits or claims for damages caused by the operation of trains, buses or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeals is hereby vacated." (Par. 11, Tr. 73, Record 61.)

That Respondent was seeking to interfere with and violate stay orders; that the suit was not for damages caused by operation of trains, but was to prevent the Petitioner from pursuing its business as a common carrier, and of the use of the properties and employees of Respondent (Par. 14, Tr. 74-75, Record 62); and,

> "That the suit of Plaintiff further seeks to recover of Defendant, The St. Louis, Brownsville & Mexico Railway Company, a sum in excess of, or at least different from, the rental provided in said contract of November 1, 1904 * * *." (Par. 14, Tr. 75, Record 62.)

22. The answer on the merits admitted notice of termination (Par. 5, Tr. 5, Record page 4); pleaded that the use

of the properties was in accordance with the contract which was valid and subsisting; that both parties were interstate carriers, subject to the Interstate Commerce Act, and by Sec. 1, Pars. 18, 19 and 20 of the Transportation Act of February 28, 1920, it was unlawful for Petitioners to abandon their operations without a certificate from the Commission (Par. 6, Tr. 6 and 7, Record pages 4-5); that no certificate permitting Petitioners to abandon the operations commenced under the contract at issue,

> "Wherefore, these defendants say that any and all notices of cancellations and any other act or word by plaintiff seeking to bring about a cessation of operations under said contracts were and are utterly void and without any legal effect; and that said contracts are, therefore, in full force." (Tr. p. 8, Record p. 6-7.)

23. In support of the respective counts in Respondent's Trial Petition it prayed: (a) For injunction; (b) for damages for use of its property after November 1, 1941, in the sum of $500.00 per day; (c) in the alternative, for the reasonable value of the use of the property; (d) for indemnity in event damages from Petitioners' operations be imposed upon Respondent; (e) for exemplary damages; (f) for interest; (g) for general relief and costs (Par. VIII, Tr. 55-56, Record p. 46-47).

24. Final judgment was rendered in the Trial Court August 16, 1943, based upon the verdict of the jury, which submitted but one issue, to-wit, the reasonable value of the use made by Petitioner Trustee of Respondent's property; denied execution because of the bankruptcy proceedings and ordered a certified copy of the judgment properly authenticated to be prepared as a claim to be filed against Petitioner Trustee; authorized execution for costs against Petitioner St. Louis, Brownsville & Mexico Railway Company, and denied all other relief prayed for; judgment was

in favor of Petitioners on all issues except value of the use (Tr. p. 114-115, Record page 89-90).

25. The defense was urged thru objections to the charge in the Trial Court and thence carried forward by Petitioners that Respondent had permitted and had not prevented the operations after notice of termination and therefore consistently ratified the contract and waived termination (Par. 2, Tr. 90, Record p. 72).

26. The operations were commenced prior to and were being conducted when the Transportation Act was enacted and no certificate permitting the operations has ever been issued by the Interstate Commerce Commission, and Respondent has never contended Petitioners may lawfully abandon said operations without a certificate by the Interstate Commerce Commission permitting abandonment.

The foregoing we believe to be a fair full statement of the material facts reflected by the record necessary to proper understanding and determination of the questions presented by the Petition for Certiorari.

Respondent submits that, stripped of all abstract and collateral questions and confusion, three ultimate propositions of law are tendered by the Petition for Certiorari and its Supporting Brief:

1. The Bankruptcy Court had exclusive jurisdiction of this suit, which determined, without interference either of possession or use of any property by the Trustee, the reasonable value of the use of Respondent's property made by the Trustee in operation of trains.

2. The Transportation Act forbade termination of the contract in accordance with its terms, under which operations commenced, until a certificate essential to abandonment of operations issue.

3. The Interstate Commerce Commission has exclusive jurisdiction to fix reasonable value of use made of Respondent's property by the Trustee in operation of trains after termination of the contract, and with respect to which operations jurisdiction of the Interstate Commerce Commission has never been invoked.

Counter-Points and Authorities

Counter-Point One

(Counter to Points I and II, Pages 17 and 24 of Petitioners' Supporting Brief)

EXCLUSIVE JURISDICTION TO DETERMINE THE REASONABLE VALUE OF THE USE MADE BY PETITIONER TRUSTEE IN OPERATING HIS TRAINS ON RESPONDENT'S PROPERTY IS NOT VESTED IN THE BANKRUPTCY COURT, AND THE STATE COURT, HAVING THE PARTIES BEFORE IT, ACTED WITHIN ITS JURISDICTION TO DETERMINE SAID VALUE.

Authorities

Anderson et al. v. *Scandrett, et al.*, 19 Fed. Sup. 681;
Sec. 66, Judicial Code, Title 28, Sec. 125, U. S. C. A., 36 Stat. 1104;
Sub. (j), Sec. 77 of the Act relating to Bankruptcy, amended Aug. 27, 1935, 11 U. S. C. A. Sec. 205 (j), 49 Stat. 911;
Stay Order Dec. 2, 1935, S. F. 34, Record pages 124-125.

Counter-Point Two.

(Counter to Point III, Page 28 of Petitioners' Supporting Brief)

THE CONTRACT HERE INVOLVED CARRIED CONTRACTUAL CONSENT OF RESPONDENT IN 1904 TO OPERATIONS HERE INVOLVED FOR

50 YEARS, SUBJECT TO TERMINATION UPON NOTICE, WHICH WAS DULY GIVEN; AND THE SUBSEQUENT TRANSPORTATION ACT REQUIRING PETITIONERS TO CONTINUE OPERATIONS UNTIL A CERTIFICATE PERMITTING ABANDONMENT ISSUE DOES NOT PREVENT TERMINATION AUTHORIZED BY THE CONTRACT AND THEREBY CONTINUE USE OF THE PROPERTY FOR THE COMPENSATION FIXED IN 1904 UNTIL SAID PERMIT IS ISSUED.

Authorities

Sec. 1, Par. 18, Act Feb. 28, 1920, 41 Stat. 477, 49 U. S. C. A., Sec. 1, Par. 18;
C. & A. v. *T. P. & W.*, 146 I. C. C. Reports, 171, 182;
Central New England R. R. Co. v. *Boston Co.*, 279 U. S. 415, 49 S. Ct. 358;
Gaston v. *Rutland Co.*, 35 Fed. (2d) 685;
Powell v. *U. S.*, 300 U. S. 276, 57 S. Ct. 470;
T. & P. v. *G. C. & S. F.*, 46 S. Ct. 263, 270 U. S. 266.

COUNTER-POINT THREE

(Counter to Point IV, Page 34 of Petitioners' Supporting Brief)

EXCLUSIVE JURISDICTION TO FIX FAIR COMPENSATION FOR THE LAWFUL USE BEING MADE BY ONE INTERSTATE CARRIER OF A LINE OF RAILWAY OWNED AND USED BY ANOTHER INTERSTATE CARRIER, FIXING WHICH IS NOT INCIDENTAL TO A PERMIT AUTHORIZING SAID USE, IS NOT VESTED IN THE INTERSTATE COMMERCE COMMISSION, IN THE ABSENCE OF ANY AGREEMENT BETWEEN THE CARRIERS, AND IT, THEREFORE, HAS NO JURISDICTION OVER THE RENTALS FIXED BY THE JUDGMENT HERE.

Authorities

Sec. 1, Pars. 18 to 20, Act. Feb. 28, 1920, 41 Stat. 477, 49 U. S. C. A., Sec. 1, Par. 18;

Sec. 3, Par. 4, as Amended Feb. 28, 1920, 41 Stat. 477, Sec. 3, Par. 5 (f), as Amended Sept. 18, 1940, 54 Stat. 902, 49 U. S. C. A., Sec. 3, Par. 4;
C. & A. v. T. P. & W., 146 I. C. C. Reports 171, 182.

ARGUMENT

I

Exclusive jurisdiction to determine the reasonable value of the use made by Petitioner Trustee in operating his trains on Respondent's property is not vested in the Bankruptcy Court, and the State Court having the parties before it acted within its jurisdiction to determine said value.

The assumptions running thru the Supporting Brief and crystallized at page 40 to the effect the Trial Court arrogated to itself jurisdiction to interfere with the Possession and use of property under control of the Bankruptcy Court, and to treat its Trustee in conducting operations required by law as a trespasser will not be found to square with this record.

The judgment denied injunctive relief. It sustained only the count for the value of the use. It stipulated that a copy be certified to the Bankruptcy Court as a claim to be considered in its administration. The compensation claimed was for property and facilities of Respondent used by Petitioner Trustee in the operation of his trains.

It should not seem necessary to argue in answer to the contention that the final stay order of December 2, 1935, which was in force at the time this suit was instituted and which specifically, "provided, however, that suits or claims for damages caused by the operation of trains * * * may be filed and prosecuted to judgment in any court of competent jurisdiction * * *", was limited to train operations which inflicted personal injuries or damages

to freight in course of transportation; nor that the claim here was not caused by the operation of trains.

The history of stay orders in this proceeding and the causes assigned therefor by the Court, itself, in those orders should be conclusive against the contention of Petitioners that the count for compensation was without the exception. The stay order of November 14, 1933, stayed all suits until after final decree, *excepting only* "claims for injuries to or death of employees" (Par. 5, page 3 of Statement). That stay order specifically provided precisely what Petitioners contend should be held to be the true intent and effect of the repealing order of December 2, 1935, which still exists, therein declaring,

> "Whereas, Subdivision (j) of Sec. 77 of the Act relating to bankruptcy, as amended August 27, 1935, has made necessary certain changes in orders respecting the staying of suits against the debtors, now it is ordered:
>
> "That Order No. 116 heretofore entered in these proceedings on November 14, 1933, is hereby repealed. That commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings, provided, however, that suits or claims for damages caused by the operation of trains * * * may be filed and prosecuted to judgment in any court of competent jurisdiction * * *." (Par. 6, page 4, Statement.)

The material change effected in said orders was to enlarge the right to sue in courts outside the Bankruptcy Courts from claims for "injuries to or death of employees" to "suits or claims for damages caused by the operation of trains". That repeal was declared by the Court to be required by Sub. (j) of the Act as amended. The prior order not only conflicted with said Sub. (j) but was also in

direct conflict with the express provision of Judicial Code Sec. 66, Title 28, Sec. 125, U. S. C. A., which provides that:

> "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

Entry of stay orders in disregard for Sec. 66 of the Judicial Code prior to the amendment of said Sub. (j) suggests the intent of Congress to make jurisdiction to stay actions in bankruptcy reorganization proceedings conform to the rule which has ever existed thru Sec. 66 of the Judicial Code, by amending Sec. 77 (j), August 27, 1935.

Contention of exclusive jurisdiction in the Bankruptcy Court and immunity of Trustees in reorganization under Sec. 77 (b) from suit arising out of carrying on the business was expressly overruled in *Anderson et al.* vs. *Scandrett*, 19 Fed. Sup. 681.

In the *Anderson* case plaintiffs brougtht suit in Minnesota against trustees of railway properties in reorganization through the Bankruptcy Court in Illinois, precisely as here. It was alleged that since October 17, 1935, the defendant trustees had a regular place of business within the jurisdiction of the court, and without license, and against the will and consent of plaintiffs said trustees defendants used on their railroad within the district, and are continuing to do so, inventions and improvements covered by patents belonging to plaintiffs. They alleged prior license agreements issued to the debtor railroad company had

terminated; but the trustees, notwithstanding, continued to commit acts of infringement. A permanent injunction was sought, with accounting of profits and damages sustained by plaintiffs resulting from the alleged infringement.

The debtor was in process of reorganization in the Northern District of Illinois upon a petition there filed June 29, 1935. The bill alleges the infringement commenced the date the trustees were appointed, October 17, 1935. The debtor petition contained the following injunction:

> "All persons * * * whatsoever and wheresoever situated, located or domiciled * * * from interfering with, attaching, garnisheeing, levying upon or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets * * * railroads, * * * in possession of the debtor * * * or in any way interfering with the same or any part thereof, or from interfering in any manner with the operation of its railroad or properties, or the carrying on of its business by the debtor under the orders of this court * * *."

The appointing court did not consent to prosecution of the suit. The trustees there did not answer to the merits, as here, but specially objected to the jurisdiction of the court on the grounds, among others, the injunction prayed for could not be granted without disturbing the assets of the debtor and interfering with the railroad and its operation in violation of the order entered by the appointing court.

For reasons fully stated in the opinion (Appendix Par. 7, p. 39), the right to sue for damages for infringement of a patent by Trustees after their right of use had terminated, and for injunction, was sustained. Here, the suit is for damages as the reasonable value of the use of property after

the right to use under a contract fixing a basis of compensation had terminated.

This case is readily distinguishable from all the cases cited by Petitioners with respect to exclusive jurisdiction for this: The judgment awarded here is for a claim, jurisdiction over which is preserved to the State Court by Sec. 66 of the Judicial Code, 36 Stat. 1104; by Sub. (j), Sec. 77 of the Bankruptcy Act as amended August 27, 1935, 49 Stat. 911; by the exception contained in the stay order entered December 2, 1935; by orders of the Bankruptcy Court May 9 and June 22, 1933, authorizing Petitioners to answer suits; and does not interfere with or disturb possession or use of any property belonging to the bankrupt and in the custody of the Bankruptcy Court. In each case cited it will appear that the judgment did, or its necessary effect would be to, disturb possession or use, or, as in *Ex parte Baldwin*, 291 U. S. 610, did not result from affirmative operations.

Petitioners strenuously endeavor to argue this case within the general rule that neither possession nor use of property actually in the custody of the Bankruptcy Court may be disturbed by another court. It is said the petition here contained a count for injunction which, if granted, would have disturbed possession. The petition also contained a count to recover damages as compensation caused by the operation of trains, and there was no effort to strike the injunction count from the petition. At the end of the trial Petitioners prevailed in the final judgment on that count. It at no time imposed injury nor interference with Trustee's possession, operation or use.

It is said the cause of necessity interferes with operations of the Trustee. There is no more consistency between that statement and the facts in the record and the defense of waiver of termination of the contract, urged upon the Trial Court in bar by Petitioners because Respondent permitted

instead of interfering with the operations, than between their Points I that exclusive jurisdiction of this suit is in the Bankruptcy Court, and IV that exclusive jurisdiction to fix rentals lies in the Interstate Commerce Commission, both simultaneously urged upon this Court.

It is said the rights under the 1904 contract passed to the Trustees; that they are property rights; and to destroy those rights interferes with the property in the custody of the Court. Petitioner Trustee took no greater rights in law under the contract than it accorded the bankrupt. When the Trustee voluntarily took the contract with its benefits, he likewise took it with its obligations. *Taylor* v. *Santa Fe*, 34 Pac. (2d) 1102, 38 N. M. 457. One obligation was to submit to termination upon notice, which was given. When the contract was terminated according to its own terms, the rights flowing from it, too, terminated. Petitioner could not evade that situation by ignoring the notice and his obligation to observe it. By no twist of sound reasoning may it be fairly concluded that rights subject to a terminable contract continue to be property in the custody of the Bankruptcy Court after termination of the contract. If the judgment of the State Courts stand, the only difference between conditions prior to termination and now, so long as Petitioners elect to continue their operations, is, that for the use they make of the property they must pay the reasonable value and not that fixed by the 1904 contract.

It is said the judgment of the State Court "would impede the effectuation of a plan of reorganization, and one involving matters of national interest, the determination of which is vested exclusively in the Interstate Commerce Commission."

The question is not of jurisdiction over reorganization. The question is, does the cause of action on which Respondent sued and recovered judgment, arise out of the operation of trains, jurisdiction over which was by the Reorganization

Act, by the Judicial Code, and by the stay order of the Bankruptcy Court itself, reserved to whatever court might acquire jurisdiction of the subject matter and of the parties. It is no sound objection to the exercise of the jurisdiction that its result would be to deprive the Trustee of continued use of Respondent's property after termination of his contract right for less than the reasonable value thereof; nor that it would "impede" his reorganization plans. Neither national interest nor any rule of law nor fair dealing calls upon a solvent carrier out of bankruptcy to submit to use of its property by an insolvent carrier in bankruptcy for less than the fair value of its use.

Moreover, the record does not sustain petitioner as Trustee under Sec. 77 of the Bankrutpcy Act, representing a covey of insolvent railroad corporations which have been enjoying the benefits of said Act continuously for 12 years in one proceeding, with no reorganization in sight, so far as this record shows, in imputing responsibility in part for the delay because of this suit. If public policy be involved, it would seem the statement of public policy in such matters made in the *Taylor* case, relied upon by Petitioners, would be quite apropos that,

> "There is no public policy recognized by the courts which allows any person, natural or artificial, to take the property of another and appropriate it to its own use, and deny to the person who is innocent of fraud the right to reclaim it. * * * On like principle, the rule is, in the case of receivers, that the receiver cannot accept the benefits of a contract without carrying out its obligations. * * * He may, under the order of the Court, exhaust the assets of a railroad corporation in experiments, but we know of no rule of law which permits him to levy a tribute on others."

It is said the main purpose of the suit was to interfere with property and operations. In the teeth of the judgment

which is sought to be reviewed which, if enforced, does only one thing, to-wit, fix the reasonable value of the use of Respondent's property made by the Trustee in operating his trains without interference, to be certified to the Bankruptcy Court as a claim in administration, how can it be seriously urged in argument that the main purpose of such suit is to interfere with the property and the operations of Petitioners?

And, finally, the Bankruptcy Court entered its order May 9, 1933, which expressly authorized the debtor to defend any suits which may be brought in any court, but withheld authority to burden the property in any manner or for payments to be made without consent of the Bankruptcy Court. On June 22, 1933, said Court entered its order which expressly conferred upon the Trustee all previous authority conferred on the debtor, thereby giving the Trustee the same power with respect to defending suits as had been previously given on May 9, 1933, to the debtor (Pars. 3 and 4, page 2 of Statement). Said orders gave Petitioners, Debtor Brownsville Company and Thompson, Trustee, advance blanket authority, in their discretion, to defend suits in any courts of competent jurisdiction whose judgments authorized no burden upon the property in the custody, nor required payments without consent, of the Bankruptcy Court. It follows that when Petitioners answered in this suit and defended upon the merits in the State Court for more than one year, as they did, the State Court had effective consent of the Bankruptcy Court thru said answers so filed to exercise jurisdiction over the subject matter of the suit, subject to the limitation against rendering any judgment which burdened or interfered with said property or sought to enforce payment without consent of said Court, and such jurisdiction could not be thereaffer withdrawn by suggestion of bankruptcy and exclusive jurisdiction in the Bankruptcy Court, as Petitioners sought to do.

Therefore, this suit and judgment, which in no wise burdened nor interfered with possession or operations of said property, but solely determined the value of the use of the property by the Trustee, to be certified to the Bankruptcy Court as a claim, exclusive jurisdiction to render such judgment was not in the Bankruptcy Court, but was the exercise of a lawful jurisdiction by the State Court.

We do not understand *In Re C. & E. I. Company, Gourley,* v. *Wham,* 121 Fed. (2d) 785, to be any authority for the proposition that claims or suits for "damages arising out of the operation of Trains" as used in Sec. 77, Subdivision (j) of the Bankruptcy Act, is limited to personal injury actions. The Court was there dealing solely with a personal injury action. The contention was, the State Court had no jurisdiction because the injury arose after adjudication to which said Subdivision (j) does not apply. The Court very definitely held that said Subdivision (j) extends to personal injury claims arising out of operations, whether before or after adjudication. It concluded Congress had personal injury claims in mind for inclusion. But it did not express any thought those were the only claims included. The Court said, at page 789:

> "Construing the proviso as a whole, it would seem the Congress intended to avoid any stay order in any of these cases where the action was for a judgment for damages arising out of the operation of the trains."

This indicates the test to be, does the claim or suit arise out of the operation of the trains, rather than, is it a personal injury claim.

II

The contract here involved carried contractual consent of Respondent in 1904 to operations here involved for 50 years, subject to termination upon notice, which was duly given; and the subsequent Transportation Act requiring Petitioners to continue operations until a certificate permitting abandonment issue does not prevent termination authorized by the contract and thereby continue use of the property for the compensation fixed in 1904 until said permit is issued.

The portion of Par. 18, Sec. 1 of the Interstate Commerce Act, of February 28, 1920, 41 Stat. 477, as amended by Act Sept. 18, 1940, 54 Stat. 899, quoted by Petitioners at page 26 of their Brief as follows:

> "* * * and no carrier by railroad subject to this part shall abandon all or any portion of the line of railroad or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment, * * *"

may be accepted as the pertinent portion of said paragraph here involved.

There is no contention of limitation against the power of Congress to outlaw contracts between carriers, nor that by any sort of evasion may an interstate carrier conducting operations at the time the Act became effective lawfully abandon those operations without consent of the Interstate Commerce Commission.

Petitioners say, therefore, that because the operations may not be lawfully abandoned without the permit, it follows that the contract burdened with a termination clause under which the operations commenced with consent may not be terminated, and any conclusion to the contrary, really, "becomes absurd."

The question plainly presented is: Did the Transportation Act destroy the termination clause of the contract and perpetuate the compensation fixed by the contract until the operations commenced under the contract shall have been abandoned, in forbidding the operations to be abandoned without a permit? The result of affirmance of that question, when viewed from its practical aspect, may be thus stated: So long as Petitioners would elect to continue their operations, they could enjoy the use of the property without respect to the reasonable value thereof, and solely on the basis of compensation fixed in a contract, subject to an unqualified termination clause, made 40 years ago. Nothing short of clear words in the Act (which are not there) evidencing such intent should induce a construction which would lead to so gross an injustice.

The power of Congress to have included in the Act a provision that all contracts were continued in force until operations commenced thereunder should be lawfully abandoned, or even until termination of the contract should be authorized by the Interstate Commerce Commission, as it did enact with respect to the operations, is not questioned. But did Congress do that? It dealt solely with operations. It said nothing about the contract nor the compensation. The Interstate Commerce Commission declined to entertain jurisdiction of an application by Respondent for authority to terminate this contract thru declination by its Secretary to file the application, he advising both Respondent and Petitioner that the jurisdiction of the Commission pertains solely to the operations and not to the contract. Petitioners say that was no act of the Commission. It was that of its Secretary, acting officially. The presumption is indulged in his favor in the collateral attack by Petitioners that he acted lawfully, under direction of the Commission, and not otherwise. Moreover, the Commission itself has expressly held that Sec. 1, Pars. 18 to 21 of said Act, confer no juris-

diction upon the Commission over the terms of the contract, in the absence of an agreement. *C. & A.* v. *T. P. & W.*, 146 I. C. C. 171.

A majority of the Commission held, at page 182 of 146 I. C. C. Reports:

> "* * * That the operation of the Alton over the tracks of the T. P. & W., between Dwight and Peoria cannot lawfully be discontinued without our certificate; and that the discontinuance of such operation without our authority may be prevented by injunction and is subject to the penalties provided by Paragraph (20) of Section.
>
> "We express no opinion as to the adequacy of the rental or the propriety of the other terms and conditions under which the Alton is now operating over the track of the T. P. & W. We have no authority to adjust that matter in this proceeding. The law, no doubt, provides a remedy for any injustice in that regard."

Petitioners next contend that the contract of 1904 and the operations now conducted are one and inseparable; that termination of the contract would of necessity terminate the operations, and, therefore, the contract may not be terminated without a prior permit to terminate the operations. If this be true, it should follow that lawful abandonment of operations would terminate a contract. The contrary has been directly held by this Court. *Central New England R. R. Co.* v. *Boston Co.*, 279 U. S. 415, 49 S. Ct. 358 (359). There, the operating company applied for and procured a permit to abandon operations commenced and conducted under a contract. The operations were abandoned. In reliance upon the permit, the contract was repudiated. It was there argued, too, that the contract and operations were inseparable, and, therefore, when the operations lawfully terminated, so did the contract. The State Court of Massachusetts differed, and, in a suit to recover upon the contract as though the operations continued, ren-

dered judgment upon the contract. In the course of the opinion upholding the Massachusetts judgment, this Court said:

> "To the suggestion of Petitioner (Central Company) that, by force of the statute, the permission to abandon its line necessarily operated to cancel its obligation, regardless of the intention of the Commission, we need only say that the statute contains no such provision, nor any language suggesting it. We need not decide whether such may be the effect of a proper order of the Commission on contracts previously entered into by the carrier and not expressly mentioned in the order, where the contract and the order necessarily conflict."

In the case of *Gaston* v. *Rutland Co.*, 35 Fed. (2d), 685, 686, 687, receivers exercised their lawful right to reject and terminate a contract, under which operations were being conducted. They could not lawfully abandon the operations without compliance with Sec. 1, Par. 18 of the Transportation Act. Therefore, the receivers contended that because the law imposed the obligation to continue operations and the contract was ended, the owning carrier could not fix the rentals of its own property. In overruling that contention the Court said:

> "Granting the undoubted duty of the receivers to operate this branch line until lawfully relieved from so doing (49 USCA, Sec. 1, Par. 18), it does not follow that they could not elect to repudiate the existing contract when they did. Ordinarily, receivers have a reasonable-time in which to elect whether or not to adopt executory contracts."

and:

> "This duty to operate their trains did not carry with it the right to use the property of the Rutland Railroad in so doing on terms imposed upon the owner without its consent."

It is, therefore, submitted that operations subject to Sec. 1, Par. 18 of the Transportation Act and a contract fixing compensation are not inseparable and that either may exist without the other, and that the doctrine contended for by Petitioners to the effect that the Transportation Act, which imposed upon Petitioners the duty to continue their operations until a permit of abandonment be procured from the Interstate Commerce Commission, inseparably bound the contract to the duty to operate and thereby froze in favor of Petitioners the 1904 basis of compensation so long as the operations continue, is not supported by reason, statute nor decision.

It is argued the Act imposes upon Respondent the duty to apply for and procure a permit for Petitioners to abandon their operations over which Respondent has no control. They say Respondent could do so under the holding in *A. T. & S. F.* v. *Railroad Commission*, 283 U. S. 380, 51 S. Ct. 553.

That was not a controversy between adversely interested carriers. It was solely between carriers of a common interest, on the one hand, and the Railroad Commission of California and the City of Los Angeles, on the other hand, with respect to forcing construction of union terminals in the City of Los Angeles. The only obstacle to enforcement by state and municipal authority of their orders to construct the terminals was the barrier raised by the carriers of essential issuance by the Interstate Commerce Commission of the permit under Sec. 1(18) of the Act. The carriers would not apply for the permit, but the City of Los Angeles did. Upon that application the permit was issued.

This Court overruled the contention the permit was void and held the right to ask for the permit was not confined to the interested carriers but could be made by any proper party in interest. Petitioners say Respondent is a proper party here, and may, therefore, apply for a certifi-

cate. There, when the permit issued, state and municipal enforcement of local law proceeded. There is no authority anywhere to force Petitioners to abandon their operations on Respondent's property. A permit would be but a mere gesture, for Petitioners have plainly indicated their fixed intention to not voluntarily abandon.

This Court seems to have already held between adversely interested carriers that one not conducting or proposing to conduct the operations is not a party having proper interest to make an application with respect to the other's operations or not under Sec. 1(18) of said Act.

In *T. & P.* v. *G. C. & S. F.*, 46 S. Ct. 263, 264, 270 U. S. 266, 273, this Court said with respect to the right of the adversely interested carrier in respect of operations to make an application under Sec. 1(18) of the Act:

> "But a party in interest, who is opposed to the construction, is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition."

If the carrier opposed to construction may not initiate an application with respect thereto, it would seem to follow that a carrier opposed to operations could not initiate an application with respect thereto.

In *Powell* v. *United States*, 300 U. S. 276, 57 S. Ct. 470, 476, the Central Railroad objected to operations in interstate commerce by the Seaboard over leased tracks for which no permit had been issued under Sec. 1(18), and procured an order by the Interstate Commerce Commission cancelling interstate tariffs over the leased line. The Seaboard sought by direct action to cancel the order and contended, if the operations were not in public interest, the Central should have invoked jurisdiction of the Interstate Commerce Commission under Sec. 1 (Pars. 18 to 20 inc.) for determination of that issue.

In response to that contention this Court said:

> "The Central was not authorized by the Act to initiate a proceeding before the Commission to determine whether the Seaboard's use of the leased tracks was or would be in the public interest. If application for a certificate had been made, the Central could have appeared in opposition. The Seaboard not having made application, the Central's sole remedy was by suit under Sec. 1, Par. 20" (Page 287).

So here, Petitioners could apply for a permit to abandon their own operation, or, if they desire the Commission to acquire jurisdiction over the compensation, they could apply for a certificate under Sec. 1 (Pars. 18-20), or Sec. 3 (4) of said Act, in which event Respondent could be heard, or they may continue their operations and ignore the Interstate Commerce Commission with respect thereto, because operations were being conducted when Sec. 1, Par. (18) was enacted. So long as Petitioners continue without a certificate and avoid submitting to the Commission the issue of public necessity and convenience or not requiring said operations (now protected because conducted when the Act became effective in 1920), there is no remedy to Respondent through which to recover reasonable value for the use being now made of its property in such operations, except by a suit.

Petitioners assert,

> "The decision below is reducible to the single proposition that Tex. Mex., without subtracting a thing from the rights which in 1904 it granted to the St. L. B. & M., has succeeded in cancelling out all those (and only those) provisions of the contract prescribing the amounts payable. That proposition is patently unsound."

Sufficient answer to this should be the undisputed record that the entire judgment with respect to compensation, and which is the only portion of the judgment which pinches

Petitioners, is squarely grounded upon the proposition that the contract which Petitioners seek to continue contained a reciprocal termination clause which was binding upon them and exercised in accordance with the contract, which was terminated as a whole long prior to commencement of the suit.

There is no conflict between the decision in this case and in *Taylor* v. *Santa Fe*, 34 Pac. (2d), 1102, 1104, 38 N. M. 457 (Par. 12 (c), p. 8 of Petition).

No analogy exists between the facts of the two cases. In the *Taylor* case officers of the Santa Fe and of the San Juan Company were identical. The San Juan Company conducted operations on Santa Fe tracks. The San Juan Company executed a conveyance or release of all rights to operate upon the tracks of the Santa Fe, stipulating "neither of the parties is under any obligation to secure the approval of this indenture by the state or federal authority." Upon the conveyance or release further operations by the San Juan Company were prevented on the tracks of the Santa Fe. A receiver for the San Juan Company sought to continue said operations upon the ground no certificate permitting abandonment had been issued by the Interstate Commerce Commission. Such certificate was undoubtedly essential to lawful abandonment under Sec. 1, Par. 18 of the Transportation Act. The certificate could not be dispensed with thru private stipulations. Yet, the Santa Fe Company, relying solely thereon, refused to permit the receiver to continue said operations.

In overruling the Santa Fe contention, the Court said in part:

> "The necessary effect of the attempted reconveyance of April 17, 1931, would be an abandonment of operations by the San Juan Railroad without the consent of the Interstate Commerce Commission, prohibited by, and made a penal offense under, federal statute." (Page 1104.)

The obvious purpose of the contract to which actual effect was given was for the San Juan Company to abandon operations. Upon those facts it was no doubt correctly held that the necessary effect and purpose of the contract was to create abandonment of operations without a permit, which was unlawful.

Here, operations were commenced prior to the Transportation Act under authority of a contract made with Respondent in 1904 which contained a termination clause. The Transportation Act of 1920 clearly interposed the burden upon Petitioners to continue their operations until they should procure from the Interstate Commerce Commission a certificate permitting abandonment, contract or no contract. It interposed upon Respondent the Duty to respect that burden. But, it does not follow, in the absence of words so stipulating (and they are absent) that the contract rights of either party governing operations were destroyed or that Respondent was by the Act to be forced to accept as compensation for its property, so long as operations should continue, that which it agreed by contract, with a termination clause, to accept 40 years before, under entirely different economic and industrial conditions. All Respondent did was exercise its right of termination, and, when Petitioners continued the use, to demand the fair value of the use as compensation, different from the 1904 basis, which Petitioners resisted, all the while continuing operations and use unmolested.

It is, therefore, submitted there is no conflict between the holdings of the New Mexico Court in the *Taylor* case and of the Texas Court here.

III

Exclusive jurisdiction to fix fair compensation for the lawful use made by one interstate carrier of a line of Railway owned and used by another interstate carrier, fixing which is not incidental to a permit by the Interstate Commerce Commission authorizing said use, is not vested in said Commission in the absence of any agreement between the carriers, and it has no jurisdiction over the rentals fixed by the judgment here.

The exclusive jurisdiction contended for should be conferred by Congress in clear language and rest on more than vagarious arguments on public policy and possible interference with plans of a bankruptcy reorganization trustee. Because the Commission has jurisdiction over rentals in prescribed situations does not tend to establish exclusive jurisdiction over all rentals.

Petitioners cite and quote from *Palmer* v. *Massachusetts*, 308 U. S. 79, and *Bankruptcy Act*, Sec. 77 (o), Title 11 U. S. C. A., Sec. 205 (o), both dealing with reorganization proceedings and recognizing, notwithstanding it is for the Trustee to determine what lines should be abandoned, nevertheless the abandonment by the Trustee is subordinate to the permit required by Sec. 1, Par. 18 of the Interstate Commerce Act, thereby leaving in the Interstate Commerce Commission ultimate jurisdiction over the question of abandonment or not. That has nothing to do with rentals.

Transit Commission, et al. v. *U. S.*, 289 U. S. 121, is relied upon. Rentals there dealt with were not with respect to a controversy where operations were being lawfully conducted both without any permit from the Commission or an agreement fixing rentals. Those rentals were fixed by mutual agreement of the carriers. It was attached to a joint application for a certificate under Sec. 1, Par. 18 of said Act. Sec. 20 of the Act authorized the certificate,

if issued, to be burdened by any terms and conditions prescribed by the Commission. The Commission issued the certificate and approved as a condition that the agreement tendered should govern.

The precise question necessary to a decision of the case was whether or not the Interstate Commerce Commission, to the exclusion of the New York State Commission, could issue the certificate and permit the operations upon the conditions set forth in the certificate.

This Court there decided the following questions:

1st. The Interstate Commerce Commission had exclusive jurisdiction to issue a certificate permitting continuation of a trackage contract between carriers in New York upon the conditions of a contract which accompanied the application for the certificate.

2d. That Sec. 1 (18) of the Interstate Commerce Act applies to railroad operations under trackage rights pursuant to a contract tendered with the application.

3d. That such jurisdiction exists where the trackage rights were enjoyed before enactment of the Transportation Act.

4th. The Interstate Commerce Commission in acting upon an application for a permit to commence or continue operations under trackage rights may prescribe as a condition thereof that the operations conform to terms and conditions which the interested carriers have agreed upon, and submitted with the application.

No fact there is analogous to any fact here. The Court there said, in part, as quoted by Petitioners:

> "The Act, including par. 18 and related provisions, is construed to make Federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. * * * On the taking effect of the Transportation

Act the State Commission was stripped of power to prescribe terms for such operation. The authority of the Interstate Commerce Commission is paramount and, in respect of the operation and agreement under consideration, it is necessarily exclusive." (Pages 128 and 129.)

The "full extent" of jurisdiction exerted on the facts of the Transit Commission case with respect to rentals was to approve the agreement and carry it into the certificate. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, is relied upon. The controversy was essentially a suit by the Oil Company to recover on allegations that unjust and unreasonable rates had been exacted over protest. The Texas & Pacific Company defended on the ground the rates had been established in accordance with the Acts of Congress thru the Interstate Commerce Commission and were conclusive until set aside. The defense was sustained. Jurisdiction of the Interstate Commerce Commission over rentals was not involved.

It is, therefore, submitted the cases cited by Petitioners do not support the point of exclusive jurisdiction in the Interstate Commerce Commission to fix rentals.

Moreover, we submit it to be clear the Interstate Commerce Commission has not been vested with original independent jurisdiction with respect to rentals, particularly where, as here, the operations are lawfully conducted without jurisdiction of the Interstate Commerce Commission having ever been invoked with respect to the operations.

The Commission is vested by Sec. 1, Pars. 18 to 20 inclusive of said Act with exclusive jurisdiction over permits to abandon or to commence operations and, when that jurisdiction is invoked, to prescribe the conditions upon which the operations may commence. If the carriers have agreed upon rentals satisfactory to the Commission, it may make the permit conditioned upon the agreement. *Transit Com-*

mission et al. v. *United States*, 289 U. S. 121. If the Commission is dissatisfied with the agreement tendered, it may refuse the permit.

Congress has also vested the Commission with jurisdiction in certain events to prescribe the compensation for use of terminals. (Sec. 3, Par. 4 of the Act as Amended Feb. 28, 1920, Chap. 91, Sec. 405, 41 Stat. 479, Sec. 3, U. S. C. A. Title 49, as Amended Sept. 18, 1940, 54 Stat. 902.) But, the jurisdiction there granted is not original and independent. It does not arise until the Commission has found: First, to be in the public interest; second, to not substantially impair the ability of an owning carrier to handle its own business, to permit another carrier the use of terminal facilities and main line track for a reasonable distance outside the terminal. After those findings are made, and in event the carriers fail to agree upon the rental, jurisdiction of the Commission to fix it arises, subject, however, to court review.

No language found in either statute suggests an intention by Congress to vest in the Interstate Commerce Commission any jurisdiction of a controversy between carriers over the reasonable value of the use made by one of the other's property in the absence of an agreement, and not incidental to exercise of jurisdiction by the Commission with respect to operations.

The Interstate Commerce Commission has itself expressly held that Sec. 1, Pars. 18 to 21 of the Interstate Commerce Act confer no jurisdiction upon the Commission over the rentals or contract when acting with respect to operations, in the absence of an agreement between the carriers. The Commission, acting thru a majority, held at page 182, 146 I. C. C. Reports, in the matter of *C. & A.* v. *T. P. & W.* (*supra* page 22).

These operations were being conducted when the Transportation Act became effective. They now exist perforce

of the Transportation Act. Neither the Interstate Commerce Commission nor anyone else, except Petitioners themselves, is vested with lawful power to terminate such operations. Petitioners may not lawfully do so without a permit from the Interstate Commerce Commission.

It is, therefore, submitted the Interstate Commerce Commission has no exclusive, if indeed any, jurisdiction over the rentals the subject of the judgment here.

Conclusion

That Petitioners covet indefinite use of Respondent's property in their operations for the compensation fixed by the 1904 contract is scarce to be doubted.

They tenaciously seek to retain the benefit of that compensation by projecting the contract so long as they desire to use the property, but repudiate entirely its termination clause.

They urge the State Court was without jurisdiction to render the judgment which fixed only against them as a claim the reasonable value of the use of the property made by them, upon the simultaneous inconsistent contentions that exclusive jurisdiction over the subject matter is in the Bankruptcy Court and in the Interstate Commerce Commission. All the while they fail and refuse to invoke or to co-operate in invoking the exercise of jurisdiction by the Interstate Commerce Commission.

They urge that the Transportation Act of 1920 (which forbade without an Interstate Commerce Commission permit subsequent abandonment by them of their operations then conducted under the 1904 contract) welded inseparable the contract and the operations, which would mean, if true, Respondent lost the benefit of termination both by notice and at the end of the term fixed by the contract, notwithstanding no word about contracts is found in the applicable section of the Act.

It is submitted no language contained in the Act supports the contention of Petitioners, nor justifies an inference Congress intended, that the prohibition against abandonment of operations by Petitioners without a permit under Sec. 1, Par. 18 of the Act, should prevent termination of the contract in accordance with its own provisions, which must result if their contention be sustained; that no rule forbidding invasion of the Bankruptcy Court jurisdiction or its administration has been transgressed; that suits of this character were expressly saved by Sub. (j), Sec. 77 of the Act as amended August 27, 1935, and by the stay order subsequently entered by the Bankruptcy Court pursuant to said amendment.

It is respectfully submitted that the Petition for Certiorari is wholly without merit and should be denied, and Respondent so prays, and for its costs.

Respectfully submitted,

M. G. Eckhardt,
Corpus Christi, Texas,
B. D. Tarlton,
Corpus Christi, Texas,
J. D. Dodson,
Transit Tower,
San Antonio 5, Texas,
E. H. Borchers,
Laredo, Texas,
Attorneys for Respondent,
The Texas Mexican Railway Company.

APPENDIX

(1)

"Kingsville, Texas, August 29th, 1904.

Mr. Thos. W. Dodd,
Vice-President, Texas Mexican Ry.,
Laredo, Texas.

DEAR SIR:

I have your favor of the 26th transmitting contract in duplicate for joint use of track between Robstown and Corpus Christi. Since draft of contract was submitted to me in July, I notice a change as to period of lease that will affect our donations at Corpus Christi. The term of lease as agreed upon between Mr. Clark and ourselves was for fifty years and the draft of contract as prepared was for the same period, but the agreement submitted with your letter of the 26th has reduced this to a term of five years. Permit me to suggest that we adhere to the original agreement for the full period of fifty years with clause providing that the contract can be terminated by either party upon twelve months written notice or by one or the other of some violation of its terms, conditions and limitations. You understand that we are to collect $10,000.00 from the Donation Committee at Corpus Christi, $5,000.00 of which is to be used for terminals and improvements; in addition to this, we participating in the expense on car basis of track repairs, which are now underway, for the entire distance between Robstown and Corpus Christi, and if cancelation clause of twelve months is inserted there should be no objections to the full period of fifty years as agreed upon. You understand, of course, a sixty days notice of cancelation would not give us sufficient time to construct an independent line between the two points.

Trusting that you can straighten this matter out at your earliest convenience in order that contract can be properly executed and approved by the various Boards, I am,

Very truly yours,

JEFF N. MILLER.

Enc.

(S. F. 160-161; Record Pages 161-162.)

(2)

"This contract shall take effect on the first day of November, 1904 and shall continue for the full term of 50 years from date unless sooner terminated by the parties hereto, or by one or the other for some violation of its conditions and limitations, and shall inure to the benefit of and shall be binding upon the successors and assigns of either party hereto.

"It is further agreed that this contract may be terminated without giving any reason therefor by either party upon giving 12 months notice of such intent to terminate the lease; the parties to the above and foregoing agreement mutually covenant and agree to observe their respective obligations imposed by this agreement, and the party of the second part (Brownsville Co.) accepts the conditions of said agreement and obligates and binds itself for the full period of this contract to operate at least one train each way daily over the line of the party of the first part between Robstown and Corpus Christi." (S. F. Vol. 1, pp. 53, 64, 65 and 159; R. 145).

(3)

Interstate Commerce Commission
Office of the Secretary
Washington

W. P. BARTEL

Secretary

Mr. J. D. Dodson, General Counsel,
Texas Mexican Railway Company,
1819 Smith-Young Tower,
San Antonio, Texas.

DEAR SIR:

This will acknowledge the receipt of your letter of August 4th, enclosing original and nine copies of the application of the Texas Mexican Railway Company for authority to cancel its trackage agreements with the St. Louis, Brownsville & Mexico Railway Company, under which the latter com-

pany operates over the line of the Texas Mexican between Corpus Christi and Robstown, Texas.

The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Section 1 (18) of the Interstate Commerce Act would extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Company. I note that on November 1, 1940, notice in accordance with the terms of the trackage agreements was given to the Brownsville Company of the intent of the Texas Mexican to cancel the contract. No application has been filed by the Brownsville Company.

Accordingly the application and copies are returned herewith.

Very truly yours,

W. P. BARTEL
Secretary

Encls.

Cc—
Mr. H. R. Safford,
St. Louis, Brownsville & Mexico Railway Company,
Houston Texas."

(S. F. pp. 157-158; R. 185.)

(4)

"Defendants admit that Mr. H. R. Safford, Senior Executive Assistant, Missouri Pacific Lines, Houston, Texas, received from Mr. M. M. Leyendecker, Vice-President and General Manager for plaintiff, a letter dated November 5, 1941, reading as follows:

DEAR MR. SAFFORD:

In a letter dated October 28, 1940, I notified you, Mr. H. M. Lull of the T. & N. O. Ry. Company and Mr. A. D. Mims of the San Antonio and Aransas Pass Ry. Company of this carrier's intention to cancel and terminate that certain contract dated November 1, 1904, and all supplemental contracts and memorandums of agreement thereto, con-

cerning their use of rails or tracks of The Texas Mexican Railway Company in its yard at Corpus Christi, Texas, and betwen Corpus Christi and Robstown, Texas, said cancellation to be effective November 1, 1941.

We have not to this date received from you any definite statement as to what you propose to do and we find you still operating on our rails. As the cancellation became effective November 1, 1941, and there is a daily accruing liability by reason of your occupancy of these rails, this is to advise you that effective this date there will be a daily charge of $500.00 a day for the use by you of these facilities. I desire to further advise you the other interested parties mentioned in the first paragraph of this letter have notified us that they will waive any further notice and join us in application to the I.C.C. for approval of the cancellation of the contract. We trust you will be willing to do likewise.

That by the same letter referred to in Paragraph 21 next preceding request was made on Mr. Safford as Senior Executive Assistant, The Missouri Pacific Lines, to join plaintiff in an Application to the Interstate Commerce Commission for approval of the cancellation of said contract of November 1, 1904."

(5)

"Answering Section (b) of IV of said petition, these defendants admit that on or shortly after October 28th, 1940, they received from plaintiff a letter bearing said date, requesting defendants to consider said letter as formal notice on the part of the Texas Mexican Railway Company of its intention to terminate and cancel, effective twelve (12) months after November 1, 1940" * * *.

(7)

"This statute has been held applicable to receivers appointed by courts of bankruptcy (citing authorities). The trustees herein are a combination of ordinary trustees in bankruptcy and receivers in equity. It would seem, therefore, that where there is an operating trusteeship under Section 77 of the Bankruptcy Act, and a claim arises

against said trustees by reason of the carrying on of said business, suit may be commenced without previous leave of court. Moreover, it is generally recognized that the last clause of Section 66 of the Judicial Code, 28 U. S. C. A., Section 125, reading, 'But such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice,' merely reserved to the appointing court the sole power over the matter of satisfaction of the rights determined in such other courts. (Citing cases.) Nor does the injunction in the order of the appointing court prevent the institution and prosecution of this suit in this jurisdiction. True, an injunction is sought with an accounting of profits and damages, but the determination of the issues herein will not violate the restraining order that was entered, nor will the institution of this suit interfere with the trustees' operation of the railroad. Any injunction that may be entered herein must be limited so as to comply with the appointing court's order; for instance, to permit the railroad to keep the alleged infringing devices upon paying reasonable compensation and to enjoin future infringement. But there is no basis for the contention that suits arising by reason of the operation of this railroad by the trustees must be lodged in the venue of the appointing court. The very impracticability of such procedure is apparent. Certainly, it could not be urged that all the shippers doing business with the railroad company while under trusteeship must proceed with their claims before the appointing court. It is recognized that the appointing court must have complete and exclusive jurisdiction to prevent any interference with the property of the debtor which hinder or delay the ultimate reorganization, but the determination of claims that will not be discharged by the bankruptcy proceeding may be determined in any forum where jurisdiction is obtained. The relief to be granted, if any, in view of the injunction of the appointing court, can be determined later." Anderson et al v. Scandrett et al, 19 Fed. Sup. 681 (683).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 42

GUY A. THOMPSON, TRUSTEE,
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, *Petitioners*,

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

BRIEF FOR RESPONDENT

M. G. ECKHARDT,
B. D. TARLTON,
J. D. DODSON,
E. H. BORCHERS,
JOHN P. BUCKINGTON,
Attorneys for Respondent

ALPHA LAW BRIEF CO., HOUSTON

SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	1
ARGUMENT	2
COUNTER-POINT ONE	2
Neither Sec. 1(18) of the Interstate Commerce Act nor any other applicable provision of law forbade the termination of the trackage contract of November 1, 1904.	
COUNTER-POINT TWO	13
The Interstate Commerce Commission is without jurisdiction to fix the compensation to be paid by Petitioners for their use of Respondent's track.	
COUNTER-POINT THREE	47
The proceedings in the Bankruptcy Court did not deprive the state courts of jurisdiction to determine the controversy.	
CONCLUSION	31

LIST OF AUTHORITIES

CASES AND DECISIONS

	PAGE
Abandonment of Line by Chicago, Rock Island & Pacific Railway Co., 131 I.C.C. 421 (1927)	5, 11
Anderson v. Scandrett, 19 F. Supp. 681 (D.C., Minn., 1937)	20, 25
Bennette v. Lewis, 176 S.W. 660 (T.C.A., Galveston, 1915, err. den.)	24
Boynton v. Ball, 121 U.S. 457, 467 (1886)	18, 26
B. & O. R. R. Co. Operation, 202 I.C.C. 733 (1935)	3
Central New England Railway Co. v. Boston & Albany Railroad Co., 279 U.S. 415 (1929)	7, 8
Central Railroad Co. of New Jersey Abandonment of Operations, 207 I.C.C. 422 (1935)	5
Chicago, Rock Island & Pacific Railway Co. Proposed Abandonment of Operations, 202 I.C.C. 164 (1934)	4
Chicago & Alton Railroad Co. v. P. T. & W. Railway Co., 146 I.C.C. 171 (1928)	4, 11
Construction of Extension by Alabama, Tennessee & Northern R. R. Co., 124 I.C.C. 114 (1927)	13
Construction of Railroad Lines in Eastern Oregon, 124 I.C.C. 529, 533 (1927)	3
Des Moines and Ft. Dodge R. R. Co. v. Wabash St. L. and Pacific Railway Co., 135 U.S. 576 (1890)	21
Detroit, P. & I. R. Co. v. Detroit and T. S. L. R. Co., 6 Fed. (2d) 845 (C.C.A., 6th, 1925)	21
Ex Parte Baldwin, 291 U.S. 610 (1934)	18
Eyster v. Gaff, 91 U.S. 521, 525 (1875)	28
Frank v. Vollkommer, 205 U.S. 521, 529 (1907)	23
Gaston v. Rutland Railroad Co., 35 Fed. (2d) 685 (1929)	8
Great Northern Railway Co. v. United States, 315 U.S. 262, 275 (1942)	3
Hebert v. Crawford, 228 U.S. 204, 210 (1913)	23
Hill v. Harding, 107 U.S. 631 (1882)	27

	PAGE
In re Chicago Rapid Transit Co., 129 Fed. (2d) 1 (C.C.A., 7th, 1942)	9
In re Kanter & Cohn, 121 Fed. 984 (C.C.A., 2d, 1903)	23
In re Mertens, 147 Fed. 182 (C.C.A., 2d, 1906)	23
In re Scruggs, 205 F. 673 (D.C., Ala., 1913)	21
In re Spitzer, 130 Fed. 879 (C.C.A., 2nd, 1904)	23
Johnson v. Kurn, 95 Fed. (2d) 629 (C.C.A., 8th, 1938)	21
Kansas City Southern Railway Co. v. Kansas City Terminal Railway Co., 211 I.C.C. 291 (1935)	5, 13
Kansas City Terminal Railway Co. v. Central Union Trust Co., 294 Fed. 32 (C.C.A., 8th, 1923)	21
Kansas, Oklahoma & Gulf Extension, 72 I.C.C. 392 (1922)	4
Kilton v. Coddington, 77 N.E. 790 (1906)	23
Louisiana and Nashville Railroad Co. v. Mottley, 219 U.S. 467 (1911)	11
McNulta v. Lochridge, 141 U.S. 327, 332 (1891)	20
Milton v. Puffer, 207 Mass. 416, 93 N.E. 634 (1911)	24
Palmer v. Webster & Atlas Bank, 312 U.S. 156, 167 (1941)	10
Powell v. United States, 300 U.S. 276 (1937)	11
Quanah, Acme & Pacific Railway Co. Construction, 158 I.C.C. 699 (1930)	4
Rice v. Kelly, 10 S.W. (2d) 1112 (Ky., 1928)	25
Rosenblum v. Uber, 256 F. 584 (C.C.A., 3rd, 1919)	21
San Juan Coal and Coke Co. v. Santa Fe S. J. and N. R. R. Co., 298 Pac. 663	7
Taylor v. Santa Fe Northwestern Railway Co., 34 Pac. (2d) 1102 (N.M., 1934)	7
Texas & Pacific Railway Co. v. Gulf, Colorado and Santa Fe Railway Co., 270 U.S. 266, 273 (1926)	10
Transit Commission, et al., v. United States, et al., 289 U.S. 121 (1933)	14
U. S. v. Interstate Commerce Commission, 98 Fed. (2d) 268; cert. den., 305 U.S. 625	6
Wabash Ry. Co. Operation, 199 I.C.C. 179 (1934), 230 I.C.C. 145 (1938)	3

STATUTES CITED

	PAGE
Bankruptcy Act, Sec. 77b	9
Bankruptcy Act, Sec. 77(j)	27
Interstate Commerce Act, Sec. 1(18)	2, 7, 8, 14, 22, 24, 29, 30
Interstate Commerce Act, Sec. 1(20)	7
28 U.S.C., Sec. 125 (Judicial Code, Sec. 66)	19

TEXTS

Collier on Bankruptcy, 14th ed., Par. 11.08	18

MISCELLANEOUS

"Adoption and Rejection of Contracts and Leases by Receivers" (Clark, Foley and Shaw), 46 Har. L. Rev. 111 (1933)	10

IN THE

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OCTOBER TERM, 1945

No. 42

GUY A. THOMPSON, TRUSTEE,
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, AND
THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, *Petitioners*,

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

BRIEF FOR RESPONDENT

Statement of the Case

Petitioners' statement of the case is substantially correct except for two items of omission:

1. The one-year termination provision contained in the November 1, 1904, contract was inserted at the suggestion of the St. Louis, Brownsville and Mexico Railway Company to enable it to procure from Respondent a fifty-year contract instead of a five-year contract as proposed by Respondent (R. 161).

2. It was not until more than a year after both re-

spondents had appeared and answered to the merits that any question was raised with respect to the jurisdiction of the court below (R. 1, 48, 56).

ARGUMENT

Counter-Point One

Neither Sec. 1(18) of the Interstate Commerce Act nor any other applicable provision of law forbade the termination of the trackage contract of November 1, 1904.

Prior to 1940, the Interstate Commerce Commission had no direct jurisdiction over trackage contracts between carriers, and the only jurisdiction ever claimed or exercised by it was ancillary to its direct jurisdiction with regard to the extension of lines under such agreements, which required a certificate from the Commission under Sec. 1(18) of the INTERSTATE COMMERCE ACT. The 1940 amendment to the Interstate Commerce Act for the first time gave the Commission direct jurisdiction over trackage contracts by forbidding them to be made without approval of the Commission. Sec. 5(2)(a)(ii). 54 Stat. L. 905. This provision was no doubt inserted to make clear the Commission's jurisdiction over new contracts relating to prior operations lawfully initiated. This new provision, however, does not purport to grant the Commission any jurisdiction with regard to the termination of contracts or to prescribe contracts for carriers not desiring to enter into them. The Commission is as lacking in jurisdiction over such matters today as it was before. Since Sec. 5(2)(a)(ii) of the Act has no bearing on the present situation, the argument will be confined to considerations arising under Sec. 1(18).

Petitioners' contention is that, absent a certificate from the Commission authorizing abandonment of operations, trackage contracts are contracts in perpetuity regardless of their expiration date and regardless of provisions for termination. The Act does not say so; the Commission has not said so; no court has said so; only Petitioners say so. In view of the grave constitutional question such a construction of the Act would raise, it is submitted that something more than Petitioners' mere assertion should be presented in support of it. The uniform practice of the Commission has been to the contrary, and since Congress specifically dealt with trackage contracts in the 1940 amendment without making any change in this practice, it must now be deemed to have Congressional approval. GREAT NORTHERN RAILWAY CO. v. UNITED STATES, 315 U.S. 262, 275 (1942).

The Commission has consistently approved trackage contracts for terms shorter than perpetuity and containing provisions for cancellation on notice.[1] The Commission, indeed, refuses to approve long term trackage contracts without provisions for termination on notice, deeming such provisions necessary for the protection of the parties against changed conditions. CONSTRUCTION OF RAILROAD LINES IN EASTERN OREGON, 124 I.C.C. 529, 533 (1927). These decisions are clearly inconsistent with the view that trackage rights can expire or be terminated only pursuant to, and contemporaneously with, a certificate authorizing abandonment of operations. If the Commission has exclusive authority to fix compensation there would be no need for a termination clause since the compensation could be changed at any time. If such a contract can be terminated only in abandonment proceedings the clause is not only useless but misleading.

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[1] e.g. **B. & O. R. R. Co. Operation**, 202 I.C.C. 773 (1935); **Wabash Ry. Co. Operation**, 199 I.C.C. 179 (1334), 230 I.C.C. 145 (1938).

In CHICAGO & ALTON RAILROAD COMPANY v. P. T. & W. RAILWAY COMPANY, 146 I.C.C. 171 (1928), the Commission had before it a situation where the owner line had exercised its right to terminate a trackage contract, and the parties were thereafter unable to agree on new terms. The majority of the Commission held that Sec. 1 (18) of the Act forbade the discontinuance of the operations previously conducted under the contract without a certificate from the Commission authorizing abandonment of the operations. The Commission expressly held, however, that it was without authority to prescribe the terms or conditions under which the operations would continue, the parties being left to their legal remedies in that regard.[2] The same situation was later involved in QUANAH, ACME & PACIFIC RAILWAY COMPANY CONSTRUCTION, 158 I.C.C. 699 (1930), where the owner line exercised its option to terminate a trackage agreement and the parties were unable to agree upon the terms of a new contract. In these circumstances the Commission authorized the user line to abandon its operations previously begun under the terminated trackage agreement and to construct its own tracks as a substitute. A similar disposition was made in KANSAS, OKLAHOMA & GULF EXTENSION, 72 I.C.C. 392 (1922), where the trackage agreement expired by its terms and the parties were unable to agree upon a new contract.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY PROPOSED ABANDONMENT OF OPERATIONS, 202 I.C.C. 164 (1934), was an application to abandon operations under

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[2] Respondent is informed that after a three-judge court had declined jurisdiction of a suit to set the order aside on the ground that the order was negative, the P. T. & W. demanded and received additional compensation from the receivers of the Alton until the use of the line was finally abandoned. The question of damages for the use of the line after the termination by notice and before the new arrangement was concluded was settled by negotiation.

a lease in which the lessor requested the Commission, as a condition to granting the authority sought, to require that applicant perform its obligations under the lease. The Commission properly held that it had no jurisdiction over such matters, their jurisdiction being confined to "whether or not the public convenience and necessity permits the proposed abandonment of operations." A similar result was reached in CENTRAL RAILROAD COMPANY OF NEW JERSEY ABANDONMENT OF OPERATIONS, 207 I.C.C. 422 (1935).

The distinction between the termination of a contract and the termination of operations, which Petitioners choose to ignore, was clearly recognized by the Commission in ABANDONMENT OF LINE BY CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, 131 I.C.C. 421 (1927). The Rock Island was the beneficiary of a perpetual trackage contract over certain lines of the Denver and Rio Grande Western. In this proceeding the Rock Island sought authority, not for the abandonment of its operations over the trackage involved, but for abandonment of such operations under the contract. The Commission disclaimed any jurisdiction stating that it was " * * * not empowered to authorize the abandonment by a carrier of its mere right to operate over the railroad of another carrier, as distinguished from its operation over such railroad" (p. 429). While the Commission pointed out that the operation could not be abandoned without its consent, it held that it had "no jurisdiction over the contractual right of one carrier to operate over the road of another * * * " (p. 429). The application was dismissed for want of jurisdiction. In another case one of the parties to a union terminal contract petitioned the Commission to change the terms of payment provided in the contract. After elaborate argument, the full Commission, in a unanimous opinion, held that it was without jurisdiction in the premises. In so doing it said:

"While the act does disclose a policy of Congress of the nature alleged by complainants, and when this Commission acts in response to some duty imposed or authority created by the act it must act in such manner as to give effect to the legislative purpose, we must reject complainants' contention that we can assume jurisdiction and act to carry out that policy independently of some duty imposed or authority created by the act. We are invested with no roving commission to carry out the policy of Congress; our powers are those delegated to us by the various sections of the Interstate Commerce Act and other acts which define the standards of right and obligation and delegate to us the function of finding the facts, determining the issues, and making the regulations necessary to give effect to those standards. We have hereinabove examined the sections of the act relied upon and found therein no delegation of authority to act upon the state of facts herein presented. Statements of the courts above quoted as to our extensive powers to carry out the legislative intent were made in connection with our exercise of powers under specific provisions of the act. We cannot, in order to carry out what we conceive to be the legislative intent, exercise powers which are neither expressly delegated, nor reasonably necessary in order to effectuate powers which are expressly delegated."

KANSAS CITY SOUTHERN RAILWAY COMPANY v. KANSAS CITY TERMINAL RAILWAY COMPANY, 211 I.C.C. 291, 304 (1935), mandamus denied, U. S. v. INTERSTATE COMMERCE COMMISSION, 98 Fed. (2d) 268 (Ct. of App., D.C., 1936), cert. den., 305 U.S. 625. If the Commission lacked power to relieve a carrier from the provisions of a burdensome contract, it is difficult to understand how it has power to impose upon a carrier a burdensome contract notwithstanding it has been terminated by a clause expressly granting that right.

TAYLOR v. SANTA FE NORTHWESTERN RAILWAY COMPANY, 34 Pacific (2d) 1102 (N.M., 1934), cited by Petitioners, is authority only for what may readily be conceded —operations under a trackage contract may not, consistently with Sec. 1(18), be discontinued without authority of the Commission even though the contract itself is no longer in force and effect. In this case one railroad had perpetual trackage rights over another. The two companies had common officers and directors. In an apparent effort to circumvent a prior court decision (SAN JUAN COAL AND COKE COMPANY v. SANTA FE S. J. AND N. R. R. COMPANY, 298 Pac. 663) the affiliated companies entered into a contract by which the user company purported to reconvey to the owner the trackage rights previously enjoyed by it. The contract expressly provided that neither party should be required to procure authority from any regulatory body in order to carry out the agreement. A receiver was appointed for the user company and, upon refusal of the owner company to permit him to operate over the tracks in question, he brought suit to enjoin the owner company from interfering with such operations. Such a suit is expressly authorized by Sec. 1(20) of the INTERSTATE COMMERCE ACT. The owner line invoked the contract referred to in defense of the suit. The court very properly held that the contract could not be enforced when the effect of the enforcement would be to violate Sec. 1(18) of the INTERSTATE COMMERCE ACT. Since Respondent is in nowise interfering, or attempting to interfere, with the operations of Petitioners over its track, the case is clearly not in point.

Petitioners' contention that the contract and the operations under it, are one and indivisible is not only contrary to the decisions of the Interstate Commerce Commission referred to but is also inconsistent with the decision of this Court in CENTRAL NEW ENGLAND RAILWAY COMPANY v.

BOSTON & ALBANY RAILROAD COMPANY, 279 U.S. 415 (1929). In that case petitioner had acquired trackage rights over tracks belonging to the respondent under a contract expiring in 1940. In 1921, pursuant to authority granted by the Interstate Commerce Commission, petitioner abandoned its operations under the trackage agreement. Thereafter it refused to make the payments required by the contract, and respondent brought suit on the contract to recover them. Petitioner contended that the effect of the Commission's order authorizing abandonment of the operation was to put the contract at an end so that it was no longer liable for the payments therein provided for. This court did not pass upon the Commission's power to relieve petitioner from its contractual obligations but held that the Commission had not purported to deal with the contract and accordingly affirmed judgment in favor of respondent for the payments in accordance with the contract. Since a trackage contract may survive operations under it, it logically follows that operations under such a contract can survive its termination.

The Second Circuit Court of Appeals dealt with a similar situation in GASTON V. RUTLAND RAILROAD COMPANY, 35 Fed. (2d) 685 (1929). The proceeding involved an intervention by the Canadian National Railway Company in the receivership proceedings of the Rutland Railroad Company, petitioning the court to require the receivers to adopt and perform an executory trackage contract and lease. The receivers conceived the contract and lease to be burdensome to the estate and formally rejected it although the operations were continued as required by Sec. 1(18) of the INTERSTATE COMMERCE ACT. The Canadian National contended that the receivers could not repudiate the contract until they had procured authority from the Commission to abandon the operations. The court rejected this contention holding that the necessity of procuring authority from

the Interstate Commerce Commission to abandon the operations had no bearing whatever on the right to terminate the contract and lease. The court held, however, that, on the evidence, the trial court had properly required the receivers to adopt the contract and lease as beneficial to the estate.

In re CHICAGO RAPID TRANSIT COMPANY, 129 Fed. (2d) 1 (C.C.A, 7th, 1942), involved the reorganization of an intrastate carrier under Sec. 77B of the BANKRUPTCY ACT. Certain properties of the debtor were being operated under a lease from another carrier, and the trustees rejected the lease as burdensome on the estate. Thereafter the operations were continued by the debtor over the property formerly leased for the account of the lessor. The lessor contended, among other things, that the lease contract could not be terminated without prior authority of the Illinois Commission. The court pointed out the plain distinction between the contract and the operations and rejected the lessor's contention in the following language (p. 8):

> "Respondent also insists that the order infringes upon certain statutory enumerated powers of the Illinois Commission. Illinois Rev. Stat., c. 111 2/3, Secs. 49a and 27(b), Section 49a forbidding abandonment or discontinuance of an existing service without consent of the Commission applies only to physical abandonment by the utility. It does not refer to an involuntary change in legal obligations between the parties. City of Geneseo v. Illinois Northern Utilities Co., 378 Ill. 506, 39 N.E. (2d) 26. As pointed out the order to reject did not work abandonment of service. Rather it was court action working an involuntary legal change in obligations."

Prior to November 1, 1941, Petitioners' operations over the tracks of Respondent were consensual. After that date, the consensual operations ceased and thereafter it was an "in-

voluntary operation" imposed by law. Cf. PALMER v. WEBSTER & ATLAS BANK, 312 U.S. 156, 167 (1941).[3]

From the foregoing, it is clear that the courts and the Commission are in accord that (1) the termination of operations does not automatically terminate a contract relative thereto, that (2) the termination of a contract does not automatically terminate operations previously conducted under it and (3) that continuance of operations after termination of a contract does not automatically revive the contract. Petitioners' contention that Sec. 1(18) of the Act operates to extend a contract which has been terminated in accordance with its terms is, we submit, plainly without substance.

Respondent is invited to file an application with the Interstate Commerce Commission for authority to abandon the operations in question. Petitioners do not intend to make any such application (R. 35) and presumably would resist any application by Respondent. In TEXAS & PACIFIC RAILWAY COMPANY v. GULF, COLORADO AND SANTA FE RAILWAY COMPANY, 270 U.S. 266, 273 (1926), this Court held that an adversely interested carrier could not initiate proceedings before the Commission to determine whether pro-

[3] The effect on the owner's rights where a lease contract is terminated after bankruptcy of the lessee and where a trackage contract is terminated after the bankruptcy of the user company are quite different. In the case of a terminated lease, the Trustee continues to operate the properties for the account of the owner. This, on the theory that the owner, by leasing its properties, has incapacitated itself from performing its proper duties as a common carrier, and it thereby impliedly consents to the continued operation of the property, for its account, so as to carry out the duties it is legally obligated to perform. See Clark, Foley and Shaw, "Adoption and Rejection of Contracts and Leases by Receivers," 46 Har. L. Rev. 111 (1933). In the case of a trackage contract, however, the owning company is still in full possession and use of its properties, and there is no basis for the application of the rules applicable to lease contracts.

posed construction by another carrier would be in the public interest, from which holding it would seem to follow that an adversely interested carrier would not be authorized to institute proceedings before the Commission opposing operation by another carrier. Of similar import is POWELL v. UNITED STATES, 300 U.S. 276 (1937). Thus Respondent's rights to initiate any such proceedings is, to say the least, doubtful, but even if its right were certain, such a proceeding would not solve Respondent's problem. If authority were denied by the Commission, Respondent would still have to go to the court, as it has already done, to recover compensation for the use of its property since the Commission refuses to deal with such matters. CHICAGO & ALTON RAILROAD COMPANY v. TOLEDO, PEORIA & WESTERN RAILWAY COMPANY, 146 I.C.C. 171, 182. If the authority were granted, it would be permissive only, ABANDONMENT BY C. R. I. & P. RAILWAY, 131 I.C.C. 421, 431, and if Petitioners ceased their operations, Respondent would still have received no reasonable compensation for the use of its property without its consent and against its will. The short answer to this contention of Petitioners is, of course, that since the contract in question has been lawfully terminated, its present concern is only with procuring reasonable compensation for the use of its property without its consent, a matter with respect to which the Commission has repeatedly said it has nothing to do. It may here be added that Respondent filed with the Commission a petition for authority to cancel the trackage agreement in August, 1941 (R. 175-183), but the application was returned with a letter stating that the Commission was without authority to consider the application (R. 185).

A word remains to be said with regard to LOUISIANA AND NASHVILLE RAILROAD COMPANY v. MOTTLEY, 219 U.S. 467 (1911). This case holds nothing more than that a private

contract cannot stand against a Congressional enactment bottomed on the power to regulate commerce even though the contract was valid when made. This is familiar law but its pertinence to the present situation is not perceived. Respondent does not seek to enforce a contract which has been declared unlawful by Congress but is here seeking only to recover compensation for the use of its property against its will. Congress has compelled Respondent to permit the continued use of its property by Petitioners until such time as the Commission shall authorize the abandonment of such use, but nowhere has Congress said that Respondent is compelled to accept as compensation for such use the consideration provided in a contract which was terminated in accordance with its terms prior to the use for which compensation is sought.

The conditions which the Commission has found to require incorporation of termination provisions in long term trackage contracts have come about in this instance and were the reason for Respondent's termination of the contract in accordance with its terms. Some time after the execution of the 1904 contract, the St. Louis, Brownsville and Mexico began moving traffic into Corpus Christi over the lines of its affiliate company, San Antonio, Uvalde and Gulf Railroad Company (R. 31) with the result that the compensation paid to Respondent was greatly decreased since it was fixed on a wheelage basis. Furthermore, the wheelage basis of apportioning maintenance expense operated unfairly to Respondent since it now uses Diesel power exclusively, which causes vastly less damage to the roadbed than the heavy steam power employed by Petitioners (R. 170-171). The Respondent's termination of the contract was therefore no arbitrary or whimsical act but was for the purpose of protecting its properties and revenues. Respondent, being a short-line railroad

with small assets simply cannot afford to continue its contributions to its Class A competitor.

Counter-Point Two

The Interstate Commerce Commission is without jurisdiction to fix the compensation to be paid by Petitioners for their use of Respondent's track.

The Commission has no general power to compel one railroad to grant trackage rights to another even though the result is an unnecessary capital expenditure for new construction. CONSTRUCTION OF EXTENSION BY ALABAMA, TENNESSEE & NORTHERN R. R. Co., 124 I.C.C. 114 (1927). The Commission has likewise disclaimed any general jurisdiction to revise contracts and fix compensation for the use by one railroad of the tracks of another. KANSAS CITY SOUTHERN RAILWAY COMPANY v. KANSAS CITY TERMINAL RAILWAY COMPANY, 211 I.C.C. 291 (1935). In one very restricted field, however, and only in that field, Congress has granted to the Commission the powers which it has withheld from it generally. Sec. 3(5) of the Act authorizes the Commission, after making certain findings, to require one railroad to permit its terminal facilities to be used by another railroad on terms to be fixed by the Commission. That power is not here involved since the Petitioners refuse to invoke it for the purpose of settling the controversy. It is expressly provided, however, that if the owner of the property is dissatisfied with the compensation fixed by the Commission, the owner may sue in court to recover just compensation for the use of its property. Thus, even in this limited field, the Commission's power to fix compensation is neither exclusive nor final.

While the Commission has no authority to fix the com-

pensation received by one carrier for the use of the tracks of another except in proceedings under Sec. 3 (5), it does have a certain amount of indirect and negative power in relation thereto when its express powers are invoked under Sec. 1 (18) or Sec. 5 (2) (a) (ii) of the Act. This negative jurisdiction can arise only when the owner and user lines have agreed between themselves with respect to the compensation to be paid for the use.[4] Such contracts cannot lawfully be put into effect without authority of the Commission under Sec. 5 (2) (a) (ii), nor can operations be commenced under such contract without authority of the Commission under Sec. 1 (18). In either case the Commission may refuse to grant authority except on condition that the parties revise their agreement in accordance with the Commission's views. The parties are then free either to abandon the proposed contract and operations entirely or to revise their contract to meet the Commission's conditions. In neither case can it properly be said that the Commission fixes the compensation. The Commission does no more than present the parties with a choice, and the choice they make is their own voluntary action. In no other situation is there any statutory or other authority for the power of the Commission to exercise even negative power over such compensation.

TRANSIT COMMISSION, ET AL., V. UNITED STATES, ET AL., 289 U.S. 121 (1933), holds nothing more than that when carriers invoke the Commission's jurisdiction under Sec. 1 (18) for an extension of lines under a trackage agreement, the Commission has power to approve or disapprove the

[4] The considerations of policy adverted to in the **Transit Commission Case**, infra, which form the basis for conferring jurisdiction on the Commission with respect to trackage contracts are present only in the case of consensual arrangements. There is no chance for improper arrangements when the compensation for use is fixed by a judicial tribunal and not by the parties themselves.

agreement to the exclusion of state authorities claiming jurisdiction in the premises. It is simply an example of the exercise of the Commission's negative jurisdiction, above referred to, and plainly does not hold that a carrier may not sue in the court to recover for the involuntary use of its property by another carrier having no contractual right in the premises.

Petitioners, being unable to point to any specific authority in the statutes for their contention, refer to a supposed desirability for uniformity in compensation paid by one carrier to another for the use of its track, which uniformity can best be procured by giving the Commission exclusive jurisdiction of such matters, and from these considerations, they attempt to deduce that the Commission in fact has such exclusive jurisdiction. This argument, of course, could more properly be addressed to Congress, but it may be noted that insofar as Congress has spoken at all in this matter, it has not accepted Petitioners' views. Sec. 3(5), the only portion of the Act authorizing the Commission directly to fix the compensation to be paid by one carrier for the use and facilities of another, specifically provides that if the owner is dissatisfied with the compensation fixed by the Commission, it may resort to the courts in a plenary suit against the using carrier to recover "proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be." This is a clear-cut expression by Congress itself that it finds no interference with the policies of the Act in permitting courts and juries to determine the compensation to be paid by one carrier for the use of the facilities of another.

Petitioners suggest no procedure whatever for bringing before the Commission the question of compensation for the use of Respondent's tracks other than to repeat the sugges-

tion that Respondent file an application with the Commission requesting authority for Petitioners to abandon operations over Respondent's line. Even if Respondent were held to be a proper party to bring such proceedings and even if it were successful, there would still have been no fixing of compensation by the Commission. Surely it would not be contended that the Commission would have power to fix compensation for future operations, the discontinuance of which it had authorized, and it is equally certain that the Commission, on authorizing abandonment, would have no authority to go back retroactively and fix compensation for the use of the property between the termination of the contract and the authorization for abandonment. If Petitioners are dissatisfied with the compensation found by the court below and are in good faith in their contention that the Commission has authority, in abandonment proceedings, to fix compensation for the use of tracks, then it is difficult to understand why Petitioners, whose right to invoke Sec. 1 (18) is unquestioned, refuse to do so and content themselves with the claim that Respondent should perform this duty for them. Obviously, we submit, Petitioners are not interested in having the Commission or anyone else fix the compensation for its use of Respondent's track; they are interested only in perpetuating as long as possible the excessively favorable terms of the contract long since terminated.

Congress has expressly and unequivocally recognized the competence of courts and juries to pass upon the proper compensation to be paid by one railroad for the use and facilities of another. Nothing in the Act prohibits the courts from determining proper compensation where the parties cannot agree, and the Act sets up no procedure whatever by which the jurisdiction of the Commission can be invoked to fix compensation in such a situation. It is submitted, there-

fore, that the courts below properly held that they had jurisdiction in the premises.

Counter-Point Three

The proceedings in the Bankruptcy Court did not deprive the state courts of jurisdiction to determine the controversy.

Petitioners characterize Respondent's suit as one having for its purpose the cancellation of a contract and the disturbance of the Trustee's possession of property. This is not sustained by the record or the facts. Respondent's petition contained no prayer whatever asking for the cancellation of any contract but sought only to enjoin the future use of its property without its consent and to recover damages for such use in the past (R. 46-47). Respondent had no need for judicial cancellation of a contract which had already been terminated in accordance with its express terms, and the court's judgment did not purport to cancel such contract. The prayer for injunctive relief was not pressed, and the trial court expressly denied any such relief. Presumably the court refused this relief on the ground that it was without jurisdiction to grant it because forbidden by Sec. 1(18) of the INTERSTATE COMMERCE ACT. The suit thus resolved itself simply into a suit for damages for the use of Respondent's property against its will.

Petitioners assert that since there was a prayer for an injunction, which was denied, the suit must be taken as having for its main purpose, interference with the Trustee's possession of property, and the court was therefore powerless to try the separate issue raised by the prayer for damages. Apart from the fact that the granting of the injunction would not have interfered with any property in the

possession of the Trustee, this contention assumes that after the Trustee's plea to the jurisdiction was belatedly filed, the court was without power to do anything other than dismiss the suit forthwith. This is plainly not the law. State courts are not required to take judicial notice of bankruptcy proceedings, and they must be pleaded and proved by a defendant seeking to take advantage of them in accordance with the state practice. BOYNTON v. BALL, 121 U.S. 457, 467 (1886); COLLIER ON BANKRUPTCY, 14th ed., Par. 11.08. We know of no requirement in either the state or the federal law requiring a court separately to pass upon law and fact issues relating to its jurisdiction. These questions can properly be taken along with the case on its merits as is often done in this honorable court. For aught that appears in the record that is what was done below, and the court's denial of injunctive relief may as well have been based on its own finding of want of jurisdiction as upon the merits. If the state court otherwise had jurisdiction to try the issue as to damages, it is difficult to see how Petitioners can reasonably complain if the state court sustained their plea to its jurisdiction to the full extent which the law commanded it. There is nothing to the contrary in EX PARTE BALDWIN, 291 U.S. 610 (1934). There the Trustee had record title to, and was in possession of, real property. Plaintiff sought to cancel the deed under which the Trustee held and to remove cloud from title. As incidental thereto plaintiff sought to recover damages for alleged breach of a covenant in the very deed he was asking the court to cancel. The court held that the main purpose of the suit was cancellation of the deed and that the count for damages was merely incidental thereto. Here plaintiff is in possession of its property, title to which is not in dispute. It seeks to recover damages for the use of its property in the past and its prayer for injunction, which was denied, was merely incidental and for the purpose of preventing

future damages and further suits which it later found it could not prevent because of Federal law.

Insofar as the Trustee is concerned, this suit was clearly authorized, both by statute and by an order of the Bankruptcy Court. Sec. 66 of the JUDICIAL CODE (Title 28, Sec. 125 U.S.C.) expressly authorizes suits against a trustee "in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed." Furthermore, the Bankruptcy Court, by order dated May 9, 1933, authorized the Debtors "to defend or liquidate by written agreement or consent and judgment any claim, action, proceeding, or suit now pending against any of said Debtors, or which may hereafter be asserted or be brought in any court or before any officer, department, commission, or tribunal to which any such Debtor is or shall be a party," but with the limitation that no action thus taken by the Debtor should have the effect of establishing any claim upon or right in the property or funds in the possession of the Debtor that otherwise would not exist (R. 121-122). By order dated July 25, 1935, the same powers were conferred upon the Trustee (R. 118). Thereafter, on motion of the Trustee, this order was modified so as to stay suits against the Debtors as well as all suits against either the Debtors or the Trustee seeking to enforce a lien on property of the Debtors in the hands of the Trustee (R. 124). The order of May 9, 1933, was never revoked or otherwise modified insofar as the Trustee is concerned. Thus, the Trustee has clearly been authorized by the court appointing him to defend this suit unless, as will hereafter be discussed, the suit interferes with possession of properties in

the hands of the Trustee.[5] So far as concerns Sec. 66 of the JUDICIAL CODE, Petitioners contend that it was intended to apply only to suits for damages in negligence cases. This court has not so interpreted the Act, and in MCNULTA v. LOCHRIDGE, 141 U.S. 327, 332 (1891), the right to sue was referred to as "unlimited" with respect to the trustee's "contracts, misfeasances, negligences and liabilities." In ANDERSON v. SCANDRETT, 19 F. Supp. 681 (D.C., Minn., 1937), for example, this section was held to authorize a suit against trustees of a railroad reorganization for patent infringement arising out of the continued use by the trustees of certain switch frogs where the use had begun under a license agreement with the debtor which was later terminated. The operation of trains over facilities belonging to Respondent is as clearly an act or transaction of the Trustee in carrying on the business as anything could be, and Respondent's suit seeks only to recover damages it claims for the use of its property in connection with such acts and transactions.

Petitioners' main contention seems to be, however, that the judgment below violates the general rule against state courts interfering with property in the possession of bankruptcy courts as well as the injunction issued by the Bankruptcy Court against interfering with the " * * * railroad's properties and premises belonging to or in the possession of any of the Debtors, or from taking possession of, or in any way interfering with the same, or any part thereof * * * "

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[5] If the Trustee believed that the suit below would interfere with property in the possession of the court or the Trustee, in violation of the court's general order, he could have invoked the jurisdiction of the Bankruptcy Court to procure a specific injunction against this particular suit. In his plea to the jurisdiction, he impliedly threatens to invoke this jurisdiction, but whether the attempt was ever made is not known to Respondent. If it was made, it was evidently unsuccessful since no such specific injunction was ever entered in the Bankruptcy Court.

(R. 122). If the Bankruptcy Court or the Trustee had in their possession a *res*, the possession of which was disturbed or interfered with by the judgment below, Petitioners' contentions would undoubtedly be correct, but the fact is that the courts below did not purport to deal with any *res* in possession of the Trustee or the Bankruptcy Court but did nothing more than liquidate a claim against the Trustee arising out of his operation of the Debtor's property. Because of the bankruptcy proceedings, the trial court expressly withheld execution of the judgment and only permitted it to be filed as a claim to the bankruptcy proceedings (R. 90-91). Petitioners assert, however, that the contract of 1904 was a *res* in possession of the Trustee, possession of which was disturbed by the judgment. This contention entirely overlooks the nature of the contract and the Trustee's rights under it. The Trustee at no time expressly adopted the contract, and if he did not adopt it, he obviously never acquired any rights under it. If, on the other hand, his failure to reject be given the effect of adoption, then he took the contract in the same plight as the Debtor held it. He took it as a whole and was bound by all of its terms. JOHNSON v. KURN, 95 Fed. (2d) 629 (C.C.A., 8th, 1938), and cases there cited. It then became his contract and the Debtor no longer had any rights or liabilities under it. IN RE SCRUGGS, 205 F. 673 (D.C., Ala., 1913); ROSENBLUM v. UBER, 256 F. 584 (C.C.A., 3rd, 1919). The rights conferred by this executory contract were personal only and did not give the user line any interest in Respondent's property. DES MOINES AND FT. DODGE R. R. CO. v. WABASH, ST. L. AND PACIFIC RAILWAY CO., 135 U.S. 576 (1890); KANSAS CITY TERMINAL RAILWAY CO. v. CENTRAL UNION TRUST CO., 294 Fed. 32 (C.C.A., 8th, 1923); DETROIT, P. & I. R. CO. v. DETROIT AND T. S. L. R. CO., 6 Fed. (2d) 845 (C.C.A., 6th, 1925). The Trustee

thus received merely a limited personal privilege to run trains over the tracks of Respondent described in the contract for the period of time provided in the contract. The contract expressly provided that either party might terminate it upon the giving of one year's notice. Petitioners concede in their brief (p. 3) that Respondent gave the required notice in such manner as to terminate the contract, in accordance with its provisions, November 1, 1941. Petitioners even inadvertently state that after that date operations were continued, not under the contract, but "in compliance with the requirements of Sec. 1(18) of the Interstate Commerce Act." The provision for termination on notice was self-executing and ended the contract, and the Trustee's rights under it, as effectually as if the date had been November 1, 1954.[6] The subsequent judgment of the state court did not terminate or purport to terminate the contract for it had already come to an end in accordance with its own terms, and the award of damages to Respondent for the use of its property did not disturb possession of the Trustee for he then had no possession to be disturbed. He no longer possessed even an intangible right, but at most a mere claim that a previously terminated right had been extended by Sec. 1(18) of the INTERSTATE COMMERCE ACT.

The distinction between suits against a receiver or trustee in bankruptcy for judgment *in personam* and those involving title to property in his possession or the possession of the

[6] Of course, if Petitioners are correct in their interpretation of the effect of Sec. 1(18), the expiration date of the contract was as meaningless as the provision for its termination on one-year's notice. The contract, according to Petitioners, is converted by Sec. 1(18) into a contract in perpetuity unless the Commission authorizes the abandonment, not of the contract, but of the operations.

Bankruptcy Court is clearly illustrated by the situation where he has taken property into his possession, under claim of right, belonging to a third party. While replevin will not lie in a state court to recover possession of the property, the trustee or receiver may be sued in trover in the state court even though the question of his right to the property would be incidentally involved. IN RE SPITZER, 130 Fed. 879 (C. C. A., 2nd, 1904); IN RE KANTER & COHN, 121 Fed. 984 (C.C.A., 2d, 1903); IN RE MERTENS, 147 Fed. 182 (C.C.A., 2d, 1906), all cited by this Court with approval in HEBERT V. CRAWFORD, 228 U.S. 204, 210 (1913). In KILTON V. CODINGTON, 77 N.E. 790 (1906), the Court of Appeals of New York sustained the jurisdiction of the state court to enter a judgment against a trustee in bankruptcy to recover the amount due plaintiff on a note and chattel mortgage. The chattel mortgage covered the stock of goods of the bankrupt, which had been taken into possession by the trustee and later sold by him, under order of the court, the proceeds being retained to satisfy any liens. The trustee asserted that the state court had no jurisdiction over the cause of action, because the fund was in the possession of the bankruptcy court. This contention was rejected on reasoning which was expressly approved by this Court in FRANK V. VOLLKOMMER, 205 U.S. 521, 529 (1907). Thus even if Petitioners were correct in their erroneous contention that "title" to property in the hands of the trustee was in some way incidentally involved in the proceedings below, the jurisdiction of the state court to enter a money judgment against the Trustee would still not be defeated.

Whether Respondent's suit be regarded as one in quasi-contract or one in tort, it is perfectly clear that it was not one to try title to any property in the possession of the Trustee. Respondent's ownership and possession of the line

of railroad involved in the suit is undisputed. Pleading and proof of that ownership and possession, and invasion by the defendant, made out Respondent's prima facie case, and if Petitioners relied upon any contractual privilege to do the acts complained of, the burden was on them to plead and prove such contractual rights. MILTON v. PUFFER, 207 Mass. 416, 93 N.E. 634 (1911). When Petitioners invoked the previously terminated contract of 1904 in defense of Respondent's suit, it amounted to a claim by them with respect to use of property in the undisputed possession of the Respondent. That the operations involved may have been continued involuntarily by operation of law (Sec. 1 (18) of the INTERSTATE COMMERCE ACT) did not change the posture of the parties in the suit below. Petitioners have never had, or claimed, any title to Respondent's tracks but have claimed only a limited personal privilege to run trains over certain of them. Respondent submits that, far from it attempting to interfere with property in the possession of Petitioners, Petitioners are affirmatively asserting rights in property concededly owned and in the possession of Respondent. A somewhat similar situation arose in BENNETTE v. LEWIS, 176 S.W. 660 (T.C.A., Galveston, 1915, err. den.), where suit was brought by the owners of certain timber land to enjoin a trustee in bankruptcy from entering upon the land and cutting the timber pursuant to a contract which plaintiff claimed to be void for lack of consideration. The trustee defended on the ground that the suit amounted to an attempt to interfere with property in the possession of the Bankruptcy Court and that the state court was consequently without jurisdiction. The court very properly held that the plaintiff was in possession of the property and that the purported contract authorizing the trustee to enter and cut the timber did not give him any possession of it, constructive or otherwise. The court, in consequence,

reversed the decision below and ordered the issuance of a temporary injunction against the trustee prohibiting him from entering and cutting timber until the case could be disposed of on the merits. The trustee in this case was in far stronger position than the Trustee here, since he had an apparent existing contractual right to enter and cut the timber which the owner could overcome only by going outside the contract itself. In the present case the Trustee has no apparent right from the contract itself since, if its terms are applicable, it has been terminated; and the Trustee must go outside the contract to make even a color of claim of right to come upon Respondent's tracks. See also RICE v. KELLY, 10 S.W. (2d) 1112 (Ky., 1928), where the jurisdiction of the state court was upheld against the contention of exclusive jurisdiction in the bankruptcy court because the effect of the judgment in the state court was to interfere with a contract right in the trustee to purchase the property involved in the suit.

Another well considered case is ANDERSON v. SCANDRETT, 19 F. Supp. 681 (D.C., Minn., 1937), where the trustees of a railroad in reorganization were sued outside the bankruptcy court for patent infringement in connection with the use of certain frogs which had been installed and previously used by the debtor pursuant to a license agreement which had been terminated. Despite the termination the trustees continued the use of the allegedly infringing frogs, and suit was filed against them for injunction and damages. The court held that the suit came within Sec. 66 of the JUDICIAL CODE, despite the contention of the trustees that the jurisdiction of the bankruptcy court was exclusive, saying:

> "Nor does the injunction in the order of the appointing court prevent the institution and prosecution of this suit in this jurisdiction. True, an injunction is sought with an accounting of profits and damages, but the de-

termination of the issues herein will not violate the restraining order that was entered, nor will the institution of this suit interfere with the trustees' operation of the railroad. Any injunction that may be entered herein must be limited so as to comply with the appointing court's order; for instance, to permit the railroad to keep the alleged infringing devices upon paying reasonable compensation and to enjoin future infringement. But there is no basis for the contention that suits arising by reason of the operation of this railroad by the trustees must be lodged in the venue of the appointing court. The very impracticability of such procedure is apparent. Certainly, it could not be urged that all the shippers doing business with the railroad company while under trusteeship must proceed with their claims before the appointing court. It is recognized that the appointing court must have complete and exclusive jurisdiction to prevent any interference with the property of the debtor which will hinder or delay the ultimate reorganization, but the determination of claims that will not be discharged by the bankruptcy proceedings may be determined in any forum where jurisdiction is obtained. The relief to be granted, if any, in view of the injunction of the appointing court can be determinated later." (p. 683.)

Insofar as the suit is against the Debtor, different considerations are applicable. No question of jurisdiction is involved, and this was clearly recognized by the Debtor since it filed only a dilatory plea asking that the suit be stayed as against it until final judgment in the bankruptcy proceedings (R. 62-63). The Bankruptcy Court's stay order was purely for the benefit of the Debtor and could be waived by it. BOYNTON v. BALL, 121 U.S. 457, 467 (1886). Since the Debtor did not attempt to avail itself of the Bankruptcy Court's stay order until more than a year after it had answered on the merits, it would seem that the State Court could prop-

erly treat the right to invoke it as having been waived and try the case, as against the Debtor, as if no stay order had ever been entered. But even if this were not true the stay order entered by the Bankruptcy Court did not bar the suit, but, if applicable, only suspended the proceedings until final judgment in the Bankruptcy Court. HILL v. HARDING, 107 U.S. 631 (1882). The court's amended stay order, as required by Sec. 77(j) of the BANKRUPTCY ACT, expressly excluded "suits or claims for damages caused by the operation of trains * * * " and authorized such suits to be filed and prosecuted to judgment in any court of competent jurisdiction (R. 125). It would seem clear that the state court had jurisdiction to determine whether the suit fell within or without this exception. If exclusive jurisdiction to determine this question were in the Bankruptcy Court, any plaintiff, in any suit against the Debtor, would be required, in effect, first to procure leave from that court, and thus the Congressional mandate would effectively be evaded. Respondent's claim, as stated in its pleadings, was against the Debtor and the Trustee jointly. It claimed damages against both defendants, and the damages claimed were alleged to have been caused by the operation of trains over its tracks. It was as much a suit for damages growing out of the operation of trains as if one of Petitioners' locomotives had negligently set fire to some portion of Respondent's right of way. The kind of claim is the same, whether the damage be accomplished quickly by means of fire, or more slowly by means of the pounding of Respondent's roadbed by the heavy power used by Petitioners and by interfering with Respondent's own operations. In the circumstances the court below could properly conclude that the stay order did not require a suspension of the proceedings against the Debtor and proceed to a trial on the merits. On the merits the court apparently found that Respondent had failed to prove its

allegation that the Debtor had operated any trains over its tracks, or caused it any damage, since it refused to award any damages against the Debtor. It did, however, enter a joint judgment against the Trustee and the Debtor for costs of suit. If this was error, it was not error over which this Court has any jurisdiction but should have been corrected, if at all, in the state court and this is true irrespective of any question of waiver. If the state court had jurisdiction over the subject matter and over the Debtor, then it had jurisdiction as much to enter an erroneous judgment for costs as to enter a correct judgment on the merits. Furthermore, even if the court were incorrect in its interpretation of the nature of Respondent's suit, and even ignoring the question of waiver, the Debtor would not, as contended by it, be entitled to a dismissal but only to an order suspending the proceedings against it until final judgment in the Bankruptcy Court.

Respondent is not unmindful of the necessity for the orderly disposition of a bankrupt's affairs in a single court. It is likewise aware that these necessities will often cause hardship to creditors or other persons having had dealings with the bankrupt. It does submit, however, that such hardships should not be extended beyond the actual necessities of the case. When, as here, a Trustee in bankruptcy operates properties extending over many states to points far removed from the seat of the Court of Bankruptcy, there is surely no imperative necessity that claims arising out of such operations be determined solely in the Bankruptcy Court. Suits against the Trustee arising out of such operations in nowise interfere with the possession or operation of the properties or with the objects of the bankruptcy since they do nothing more than liquidate claims, the disposition of which is later determined by the Bankruptcy Court. Long ago this Court said, in EYSTER v. GAFF, 91 U.S. 521, 525 (1875):

> "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except insofar as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions."

Respondent here owns, and is in undisputed possession of, a line of railroad situated some thousand miles away from the Bankruptcy Court. The Trustee is running trains over a portion of these tracks, and Respondent is powerless to prevent this use of its property because of Sec. 1 (18) of the INTERSTATE COMMERCE ACT. Respondent's title and possession is clear, and the Trustee's invasion of it is equally clear. The Trustee makes, and can make, no claim of title to Respondent's property but asserts only that he is entitled to pay less for his use of it than an independent court of justice has found he should pay. The damages suffered by Respondent from his operations can only be determined, according to him, by a court one thousand miles away from where his activities have occurred. The hardship

resulting to Respondent by sustaining any such contention is manifest and would be imposed upon Respondent in the very teeth of a contrary Congressional policy expressed in Sec. 66 of the JUDICIAL CODE. Such a hardship would be visited not only on Respondent but would establish a rule requiring property owners anywhere, whose property had been invaded by the Trustee, to go to the Bankruptcy Court to protect their rights on the mere assertion by the Trustee that his rights were superior to the owner of property in possession of it. If it were not for the compulsion of Sec. 1(18) of the INTERSTATE COMMERCE ACT, there could be no doubt whatever of Respondent's right to bring this suit and, indeed, to prevent Petitioners from using its property at all. The fortuitous circumstance that Respondent cannot lawfully prevent Petitioners' invasion of its property, itself a hardship, should not impose upon Respondent the additional hardship of proving its damages a thousand miles away from where they occurred.

The cases cited by Petitioners are not in point. They all involved proceedings to determine title to real property in the actual or constructive possession of the Trustee or to protect, by specific injunction, the equity of the bankrupt in mortgaged property. No one now questions that a bankruptcy court has exclusive jurisdiction to determine title to property in its actual or constructive possession, or its right to prevent the bankrupt's equity in property from being destroyed by foreclosure. However, none of these cases even intimate, much less hold, that when a trustee invades property admittedly owned by, and in possession of, one not a party to the bankruptcy proceedings, the bankruptcy court has exclusive jurisdiction to determine the question of whether such invasion is with or without the consent of the owner and what damages the owner is entitled to recover for such invasion.

Conclusion

The position of Petitioners, by ordinary standards at least, is something short of just and fair. What they bargained for was the privilege of using a portion of Respondent's property, for a favorable consideration, until such time as the privilege should be terminated in accordance with the contract. On November 1, 1941, when the contract was terminated in accordance with its express terms, Petitioners had already received the full measure of their bargain. Not only is this true, but because of the provisions of an unanticipated Act of Congress, Petitioners are already receiving something more than they bargained for—the continued privilege of using Respondent's property upon payment only of the reasonable value of the use thereof as determined by a court. Not satisfied with this windfall, they seek to pound Respondent's roadbed indefinitely for a consideration fixed forty years ago by a contract now terminated in accordance with its own terms, which consideration is far less than what an independent judicial tribunal has found presently to be the reasonable value of such use. Such a position is so contrary to reason and justice that no court, we submit, should sustain it. Respondent, on the other hand, seeks to reap no unfair advantage over Petitioners. It seeks only to recover its damages for the use of its property without its consent, the measure of which damages is the reasonable value of the use of its property as determined, not by itself, but by an independent judicial tribunal. In terminating the contract as it did, it has done nothing more than exercise a right which the Interstate Commerce Commission has said any carrier should reserve to itself in long term trackage contracts to protect its properties and its revenues against changed economic conditions which would make a continuation of the contract unjust or unfair to it.

Petitioners' contention with regard to the jurisdiction of

the Bankruptcy Court likewise calls for the imposition upon Respondent of a manifest injustice. Without disputing the title and possession of Respondent, and without disputing that the 1904 contract was long since terminated if its terms alone be looked to, Petitioners' claim that their mere assertion that something outside the contract has revivified it converts Respondent's suit for damages for invasion of its property without its consent and against its will into a suit to try title to property in the hands of the Bankruptcy Court and cognizable only there. This, despite the fact that the operations giving rise to the suit took place in Texas, and the Trustee is as well able to defend his actions there as elsewhere while requiring Respondent to go a thousand miles away to vindicate its rights would entail grave hardship and inconvenience on it without such hardship being required by any of the exigencies of the bankruptcy administration. The trial of the case in the state court in Corpus Christi entailed no additional inconvenience to the Trustee over that which he would have suffered by trial in the Bankruptcy Court in St. Louis. Obviously, he is not concerned with the legitimate demands of the bankruptcy reorganization but only with making it as difficult as possible for Respondent to recover reasonable damages for the use of its property.

The judgment below was right and should be affirmed.

Respectfully submitted,

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p. 11

SUPREME COURT OF THE UNITED STATES.

No. 42.—October Term, 1945.

Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor, and the St. Louis, Brownsville and Mexico Railway Company, Petitioners,
vs.
The Texas Mexican Railway Company.

On Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

[April 29, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Brownsville (The St. Louis, Brownsville and Mexico Railway Co.) and Tex-Mex (The Texas Mexican Railway Co.) are interstate carriers by railroad and subject to the provisions of the Interstate Commerce Act. 24 Stat. 397; 41 Stat. 474, 49 Stat. 543, 54 Stat. 899, 48 U. S. C. § 1. On November 1, 1904, they entered into a written contract whereby, for payment of specified rentals, Tex-Mex granted Brownsville the right to operate its trains over the tracks of Tex-Mex between Robstown and Corpus Christi, Texas, and to make use of terminal facilities of Tex-Mex at Corpus Christi. The contract provided that it was to continue for a term of 50 years from its date unless sooner terminated by the parties. And it contained the following provision, "It is further agreed that this contract may be terminated without giving any reason therefor, by either party, upon giving twelve months notice of such intent to terminate the lease."

In 1933 Brownsville filed its petition for reorganization under § 77 of the Bankruptcy Act.[1] The petition was approved and petitioner Thompson was appointed as trustee in the proceeding. Shortly thereafter the bankruptcy court entered stay orders to which we will later refer. In October, 1940 Tex-Mex notified petitioners that it was exercising its right to terminate and cancel the trackage contract, effective twelve months after November 1, 1940. The trustee, however, continued to operate over the Tex-Mex and

[1] This petition was filed in the reorganization proceedings of the Missouri Pacific R. Co. which owned about 94 per cent of the voting stock of the New Orleans, Texas and Mexico Ry. Co., which in turn owned all of the voting stock of Brownsville.

to use the Tex-Mex facilities after November 1, 1941. Tex-Mex informed him that a charge of $500 per day would be made for the use of these facilities—an amount in excess of the rental under the contract. The trustee refused to pay any rental other than that specified in the contract.

Thereupon this suit was instituted by Tex-Mex in the Texas courts to enjoin Brownsville and its trustee from using the tracks or other facilities without the consent of Tex-Mex and to recover $500 a day damages for such use or, alternatively, the reasonable value of the use of the property. The trial court overruled pleas to its jurisdiction and tried the case on the merits. It denied an injunction. It held that the 1904 contract had been terminated and awarded Tex-Mex damages in the amount of $184,929.85. The Court of Civil Appeals affirmed.[2] 181 S. W. 2d 895. The Supreme Court of Texas refused an application for a writ of error. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems in the administration of the Interstate Commerce Act and of the Bankruptcy Act.

First. It is contended here, as it was in the state court, that the maintenance of the present suit is precluded by the stay orders issued by the bankruptcy court and by § 77 of the Bankruptcy Act.

Sec. 66 of the Judicial Code, 28 U. S. C. § 125, authorizes suits against the trustee, without leave of the bankruptcy court, "in respect of any act or transaction of his in carrying on the business."[3] In *McNulta* v. *Lochridge*, 141 U. S. 327, 332, this statute was said to grant an "unlimited" right "to sue for the acts and transactions" of the estate. Operation of the trains is plainly a part of the trustee's functions. Claims which arise from their operation—whether grade crossing claims as in *McNulta* v. *Lochridge, supra*, or claims for the use of the tracks of another as in the present case—are claims based on acts of the trustee in conducting the business. Hence this suit, so far as it involves only a money claim against the estate for acts of the trustee in oper-

2 No complaint was made on appeal of the denial of an injunction.

3 "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

ating trains over respondent's tracks, could be maintained in the state courts against the trustee.[4] And the stay orders entered were wholly consistent with this course.[5]

It is argued, however, that this suit cannot be maintained consistently with the provisions of § 77 which grant the reorganization court exclusive jurisdiction over the debtor and its property.[6] The theory is that the suit interferes with the administration of the estate, adjudicates the trustee's interest in property in his possession, and indeed seeks to disrupt the operating schedule of trains. It is clear that the issuance of an injunction against operation of the trains over respondent's tracks would have been an interference with the exclusive jurisdiction of the reorganization court. The fact that no injunction was granted is not a decisive answer. In *Ex parte Baldwin*, 291 U. S. 610, 618, the Court held that the exclusive jurisdiction of the bankruptcy court is determined by the "main purpose" of the suit. In that case suit had been brought in the state courts to have a railroad right of way declared forfeited and in addition to recover damages. The claim for damages was held to be "merely an incident" to the suit for a forfeiture and did not save the suit from the defense that it was of the type which sought to interfere with the exclusive jurisdiction of the bankruptcy court. We do not construe the present bill as having as its main object the stoppage of the movement of petitioner's trains over respondent's tracks. The main purpose of the suit seems to be an attempt on the part of respondent to obtain a more favorable rental.

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[4] Judgment for damages was granted only against petitioner, trustee; judgment for costs was granted against the trustee and Brownsville jointly and severally.

[5] The stay orders authorized the trustee to defend any suits which might be brought.

In view of our disposition of the case it is unnecessary to decide at this time whether or not the suit may also be maintained against Brownsville. The stay order, entered for the benefit of the debtor, followed the provisions of § 77(j) of the Bankruptcy Act, 49 Stat. 911, 922, 11 U. S. C. § 205(j) and provided: "That commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings, provided, however, that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated."

[6] Sec. 77(a) provides in part. "If the petition is so approved the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located."

The fact, however, that respondent's suit does not have as its main purpose the ouster of petitioners from possession is not a complete answer to the plea to the state court's jurisdiction. As *Ex parte Baldwin, supra*, p. 616, held, the exclusive jurisdiction of the bankruptcy court is not limited to protecting the possession of the trustee; it "extends also to the adjudication of questions respecting the title." See *White* v. *Schloerb*, 178 U. S. 542; *Whitney* v. *Wenman*, 198 U. S. 539. Petitioners argue that the present case comes within that principle. It is pointed out that this suit seeks the cancellation of the trackage agreement. It is argued that the rights granted Brownsville under that agreement are property rights; and that a suit to cancel the agreement and collect amounts other than the specified rentals is a suit which interferes with and adjudicates title to the property. If we were dealing here with a lease, a suit to effect its forfeiture could not be maintained in another court without consent of the reorganization court. But the trackage agreement created only a personal obligation and did not purport to grant Brownsville any estate in the property of Tex-Mex. See *Des Moines & Ft. Dodge R. Co.* v. *Wabash, St. Louis & P. Ry. Co.*, 135 U. S. 576, 583; *Union Pacific Ry. Co.* v. *Chicago, Milwaukee & St. P. Ry. Co.*, 163 U. S. 564, 582-583. It was an executory contract subject to termination on a specified notice. The exclusive jurisdiction of the reorganization court was a barrier to any action by any other court which would disturb the possession of the trustee or interfere in any way with his operation of the business. But, apart from the qualification to which we will later refer, litigation restricted to the amount due under a contract, express or implied, for the use by the trustee of another's property no more interferes with the administration of the estate than suits to determine his liability under contracts calling for the delivery of coal or other supplies. In each the claim is reduced to judgment and may then be presented to the bankruptcy court for proof and allowance. Cancellation of a contract pursuant to its terms alters, of course, rights and duties of the trustee. But the bankruptcy rule is that he takes the contracts of the debtor subject to their terms and conditions. Contracts adopted by him are assumed *cum onere*.[7] The general rule is (1) that if the other party had a right to terminate the arrangement, that right survives adoption of the contract by the trustee; and

[7] See Greif Bros. Cooperage Co. v. Mullinix, 264 Fed. 391, 397; 4 Collier on Bankruptcy (14th ed.), § 70.43.

(2) that the incidence of termination, except as it interferes with the exclusive jurisdiction of the bankruptcy court, may be litigated in any court where the trustee may be sued. That rule of bankruptcy is applicable to proceedings under § 77 by reason of § 77(l) which provides:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

But, as we shall see, the qualification in § 77(l) that the rule of bankruptcy be "consistent with the provisions" of § 77 made premature an adjudication by the court that the contract was terminated, prior to a determination by the Interstate Commerce Commission that that step was consistent with the reorganization requirements of the debtor.

Second. Prior to the rendition of judgment on the merits the decision of the Interstate Commerce Commission was necessary on two phases of the controversy—one under § 77 of the Bankruptcy Act, the other under provisions of the Interstate Commerce Act.

(1) As we have said, the right to terminate a contract pursuant to its terms survives the bankruptcy of the other contracting party. And that general bankruptcy rule is applicable in § 77 proceedings by reason of § 77(l), which, as we have said, incorporates into § 77 the rules governing the duties of debtors and the rights and liabilities of creditors so far as they are "consistent with the provisions" of § 77. We have considered the meaning of that qualification in No. 384, *Smith* v. *Hoboken Railroad, W. & S. C. Co.*, decided this day. We there held that a covenant of forfeiture in a lease of railroad tracks and facilities should not be enforced by the bankruptcy court prior to a determination by the Commission that such step would be consistent with the reorganization requirements of the debtor. The Commission has the primary responsibility for formulating plans of reorganization under § 77. See § 77(d). Forfeiture of leases by the court in advance of a determination by the Commission of the nature of the plan of reorganization which is necessary or desirable for the debtor may seriously interfere with the performance by the Commission of the functions entrusted to it.

We think that the same considerations are applicable to a determination that the trackage agreement in this case should be terminated pending formulation of a reorganization plan. By § 77(b) the plan of reorganization may adopt or reject executory contracts of the debtor as well as unexpired leases. And the adoption of either an executory contract or of a lease by the trustee does not preclude a rejection of it in the plan. Moreover, trackage agreements like leases of railroad tracks and facilities are means by which railroad systems have been assembled. The retention or the sloughing off of trackage agreements may assume importance in the fashioning of a plan of reorganization by the Commission. The problem is kin to that involved in *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & P. Ry. Co.*, 294 U. S. 648. In that case the Court sustained the power of the reorganization court to enjoin under § 77 creditors, who held collateral notes of the debtor railroad secured by its bonds and bonds of its subsidiaries, from selling the collateral under a power of sale in the notes, where the sale would so hinder, obstruct or delay the plan of reorganization as would likely defeat it. The Court stated (p. 676) that a proceeding under § 77 is a "special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." The Court concluded, in view of the complexity of the problems involved in the reorganization, "that without the maintenance of the *status quo* for a reasonable length of time no satisfactory plan could be worked out." p. 679.

That decision prevented in the interests of a reorganization the enforcement of the provisions of the contracts of the debtor according to their terms. We think like reasons make it important that the *status quo* of this trackage agreement be maintained pending decision by the Commission as to the proper treatment of it in the reorganization plan. The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not only the interests of the two parties to the trackage agreement but phases of the public interest as well. A court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with

which it has been entrusted. For these and like reasons which we have discussed in *Smith* v. *Hoboken Railroad, W. & S. C. Co.*, *supra*, we think the court erred in holding that the trackage agreement had been or should be terminated.

(2) The Commission has further functions to perform apart from determining under § 77 whether it would be consistent with the reorganization requirements of the debtor to terminate the trackage agreement.

By § 1(18) of the Interstate Commerce Act it is provided that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." Carriers being reorganized under § 77 of the Bankruptcy Act are not exempt from that provision. § 77(o), 11 U. S. C. § 205(o); *Warren* v. *Palmer*, 310 U. S. 132, 137-138. Whatever may be the powers of the Commission under the Interstate Commerce Act, rather than § 77, over the terms of the trackage agreement (*Abandonment of Chicago, R. I. & P. Ry. Co.*, 131 I. C. C. 421; *Kansas City So. Ry. Co.* v. *Kansas City Terminal Ry. Co.*, 211 I. C. C. 291), it is clear that the Commission has jurisdiction over the operations. Sec. 1(18) embraces operations under trackage contracts, as well as other types of operations. See *Chicago & Alton R. Co.* v. *Toledo, Peoria & W. Ry. Co.*, 146 I. C. C. 171, 179-181. And the fact that the trackage contract was entered into in 1904 prior to the passage of the Act is immaterial; the provisions of the Act, including §1(18), are applicable to contracts made before as well as after its enactment. See *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 482. Though the contract were terminated pursuant to its terms, a certificate would still be required under § 1(18). Brownsville or its trustee could, of course, make the application for abandonment of operations. But the fact that they might be content with the existing arrangement and fail or refuse to move does not mean that Tex-Mex would be burdened with a trackage arrangement in perpetuity. Tex-Mex might invoke the Commission's jurisdiction under §1(18) and make application for abandonment of operations by Brownsville or its trustee. There is no requirement in § 1(18) that the application be made by the carrier whose operations are sought to be abandoned. It has been recognized that persons other than carriers "who have a proper interest in the

subject matter" may take the initiative.[8] See *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 283 U. S. 380, 393-394. An application by a city and county for abandonment of a part of the Colorado & Southern line was indeed entertained. *Colorado & Southern Ry. Co. Abandonment*, 166 I. C. C. 470. Tex-Mex has even a more immediate interest in the operations over this line. Its property is involved; and the amount being paid for the use of its property is deemed by it insufficient. The Commission is as much concerned with its financial condition as it is with that of Brownsville. Tex-Mex therefore has the standing necessary to invoke § 1(18).

Tex-Mex, however, points out that in 1941 it made application to the Commission "for authority to cancel trackage agreements" with Brownsville and that the Secretary of the Commission returned the application saying "The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Section 1(18) of the Interstate Commerce Act would extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Company." We need not consider whether the application was in proper form for one authorizing and requiring abandonment of operations by Brownsville. In any event, the secretary of the Commission was without authority to bind the Commission in the matter. Cf. *Minneapolis & St. Louis R. Co.* v. *Peoria & P. U. Ry. Co.*, 270 U. S. 580, 585.

(3) The jurisdiction of the Commission is not restricted, however, to determining whether or no operations of Brownsville over the tracks of Tex-Mex should be abandoned. Prior to the Transportation Act of 1940 the Commission had some jurisdiction over trackage agreements of the character involved in this case. *Transit Commission* v. *United States*, 289 U. S. 121. But by that Act the Commission received new, explicit powers over trackage rights. Sec. 5(2)(a)(ii) provides: "It shall be lawful, with the approval and authorization of the Commission, as provided in subsection (b) . . . for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals

[8] Cf. Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 273, which holds that a party in interest who is opposed to construction of an extension may not "initiate before the Commission any proceeding concerning the project", his remedy being to appear in opposition if application is made or to seek an injunction under § 1(20) if no application is made. And see Powell v. United States, 300 U. S. 276.

incidental thereto." Trackage rights acquired without the consent and approval of the Commission are unlawful. § 5(4).

The authority of the Commission under § 5(2)(a) extends to fixing terms and conditions, including rentals, for any trackage agreements entered into subsequent to the effective date of the Transportation Act of 1940. If, therefore, the two carriers had voluntarily terminated the 1904 trackage contract and had entered into a new one without the approval of the Commission, they would have violated the Act. There would be no difference in result merely because the trackage contract expired by its terms or was terminated by operation of an escape clause. Until abandonment is authorized, operations must continue. While they continue, trackage rights are being enjoyed. In absence of administrative control, the law would under those circumstances imply a contract for the use of another's property and award reasonable compensation. Thus trackage rights would be acquired on such terms as the court and jury determined. But § 5(2)(a) vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. The jurisdiction of the Commission is exclusive. *Transit Commission* v. *United States, supra.* In that case the Commission had approved a trackage agreement between two carriers and the Court held that the Commission's jurisdiction being exclusive, approval by a state commission was not necessary. The court below thought that case was not controlling here, in view of the fact that the Interstate Commerce Commission had not acted. But in a long line of cases beginning with *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, the court should stay its hand until the Commission had passed on the matter. See *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, and cases cited. That course is singularly appropriate here. It is the function of the Commission to determine the terms and conditions under which trackage rights are acquired. If the parties were allowed to by-pass the Commission and litigate the question in the courts, the power to fix the rental under trackage agreements would be shifted from the Commission to the courts and juries. Moreover, one jury would determine the amount of compensation due for the period here in question and another jury

the amount due for a subsequent period. But a major concern of Congress in dealing with this problem was that neither inadequate rentals nor extortionate nor unreasonable exactions would be made for trackage rights. *Transit Commission* v. *United States*, *supra*, p. 128. Those questions intimately relate to the financial strength of carriers. And it is one of the Commission's high functions to protect the public interest against unfair or oppressive financial practices which in the past led to such great havoc and disaster. That policy would be undermined if the carriers could repair to courts for determination of the conditions under which trackage rights could be secured. Then jury verdicts or settlements would take the place of the expert and informed judgment of the Commission.

It is suggested, however, that the Commission is empowered to fix the rental only for the future and that it has no power to make an award with retroactive effect. But on this phase of the case we are not dealing with the problem of reparations. In any case where application is made for trackage rights the terms and conditions fixed by the Commission are applicable when the certificate of public convenience and necessity takes effect. If operations do not start until that time, no problem is presented. But frequently there will be applications for renewal of trackage agreements which have expired. Operations may not be discontinued until a certificate of abandonment is obtained. If new trackage rights are granted, they run from the expiration of the old and their terms and conditions are applicable to the full term.[9] Once the Commission has acted, the court may then proceed to enter judgment in conformity with the terms and conditions specified by the Commission. See *El Dorado Oil Works* v. *United States*, No. 428, decided April 22, 1946.

It is argued, however, that the trackage rights envisioned by §5(2)(a) of the Act are consensual arrangements between the parties; and that the Commission is not granted authority to force a trackage agreement on a carrier. We do not decide what may be the full reach of the power of the Commission under §5(2)(a). We are dealing here with an existing operation, not with a case where one carrier seeks to initiate a new one by ac-

[9] The terms and conditions approved by the Commission in Long Island R. Co. Trackage, 180 I. C. C. 439, affirmed Transit Commission v. United States, 289 U. S. 121, were given retroactive effect in that sense.

quiring the right to run its trains over the tracks of another. The Commission has the power under § 1(18) to refuse to allow abandonment of the operations. If it so refuses, trackage rights continue to be enjoyed by Brownsville. The question of what would be the amount of a fair rental to be paid Brownsville would be highly relevant to a decision by the Commission on the issue of abandonment. We conclude that at least in that situation the Commission has the power under § 5(2) to fix a reasonable rental for the use of the facility by Brownsville regardless of the consent of Tex-Mex.[10] Denial of that power to the Commission is not required by the language of § 5(2)(a). And this construction of § 5(2)(a) is in harmony with the power of the Commission under § 1(18) to refuse to authorize the abandonment of operations. If operations must continue, it is more consistent with this scheme of regulation for the Commission rather than courts or juries to determine the amount of the rental. Any legal, including constitutional, rights of Tex-Mex are protected by the review which Congress has granted the orders of the Commission.

Third. If the Commission granted trackage rights, Tex-Mex could then recover judgment, as we have said, for the amount of the rental fixed by the Commission. If, on the other hand, the Commission authorizes the operations to be abandoned, it "may

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[10] The argument is that the Commission has that authority only under § 3(5) which gives the Commission authority to require the use of terminal facilities including main-line tracks for a reasonable distance outside of the terminal.

Sec. 3(5) provides: "If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers, shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirements, or just compensation for such use, or both, as the case may be."

attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." § 1(20). The Commission could permit abandonment unless Brownsville paid such reasonable compensation for the use of Tex-Mex's property as the Commission should fix. In that case, too, the court would have an administrative finding as a guide to the judgment it would enter. In case abandonment were authorized without more, respondent would then be free to move in this proceeding for judgment and to apply to the bankruptcy court for compliance with the Commission's order. In all those situations suits to recover the amounts due for use of the tracks of Tex-Mex could be maintained in the state court[11] under the principles announced in *Central New England Ry. Co.* v. *Boston & Albany R. Co.*, 279 U. S. 415, 420. If, however, the Commission decided that the trackage agreement should be dealt with in the plan, the state court would not have power to proceed further. For respondent's rights would be protected by the provisions of the plan which may be reviewed only by the reorganization court. § 77(e).

Thus, however the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[11] If the order of the Commission were challenged, its review could of course be had only in the manner provided by statute. See El Dorado Oil Works v. United States, decided April 22, 1946.